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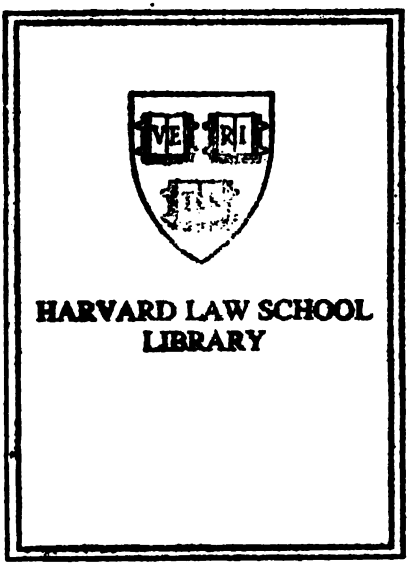

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48	719	53	249	40	797	18	418	51	656		
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19	272	30	570	21	213			18	559		
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21	525	18	154			23	85	21	591		
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ERRORS AND APPEALS

FOR THE

STATE OF MISSISSIPPI.

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BY

W. C. SMEDES AND T. A. MARSHALL,

OF VICKSBURG,

REPORTERS TO THE STATE.

VOLUME X.

CONTAINING CASES FOR JANUARY TERM, 1848.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN

1848.

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ADVERTISEMENT.

THIS volume contains one hundred and five cases; and includes all the opinions not reported in volume nine, which were delivered at the January session, 1848, except, of course, those marked "*not to be reported.*"

At that session the court delivered nearly two hundred and fifty written opinions.

It will be seen, by an inspection of this volume, that the reporter publishes only a condensed statement of the arguments of counsel, making them accord as nearly as possible with the requirement of the legislature, which limits the briefs to "a concise statement of the points submitted, and a like reference to the authorities cited on both sides." It was clearly not the expectation of the legislature that the labor of abridging these arguments should fall on the reporter. The phraseology of the law shows that counsel were expected to furnish their briefs prepared for publication according to the rule prescribed; and yet in not more than a half dozen instances has the requirement been complied with; the consequence has been that the labors of the reporter have been greatly augmented in the work of pruning, abridging and condensing arguments at the risk, in many cases, of giving dissatisfaction, if not offence.

It would be more satisfactory to the bar and in the highest degree gratifying to the reporter, if counsel would for themselves furnish in each case a brief in accordance with the law; such brief will in all cases be published.

VICKSBURG, July 3, 1848.

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JUDGES DURING THE TIME OF THESE REPORTS.

HON. WILLIAM L. SHARKEY, LL. D., CHIEF JUSTICE.
HON. A. M. CLAYTON, } JUSTICES.
HON. J. S. B. THACHER, }

JOHN D. FREEMAN, ESQ., ATTORNEY-GENERAL.
WILSON HEMINGWAY, ESQ., CLERK.

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CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ERRORS AND APPEALS

FOR THE

STATE OF MISSISSIPPI.

JANUARY TERM, 1848.

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Richard W. Graves et al. *vs.* Tilghman M. Tucker, Governor of the State of Mississippi.

To an action on a deed or bond, if it be plead that the instrument sued on was an escrow, the plea must aver upon what condition the deed or bond was executed; such an averment is indispensable to the plea of an escrow. P. and B. and G. being sued as sureties on a bond executed by R. S. G. as principal, and them and M. and H. as sureties, payable to the state, conditioned for the faithful discharge by R. S. G. of his duties as state treasurer, plead that M. and H. had signed and sealed the bond as sureties, when it was presented to them; and they signed and sealed it likewise, as sureties, in the belief that the bond was the valid act of M. and H.; but that M. and H. had delivered the bond to R. S. G., the principal, to be binding on M. and H., on condition that W. H. and S. P. would also execute the same, and that W. H. and S. P. had not executed it, by which means M. and H. were not liable on the bond, wherefore P. and B. and G.

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were not liable, wherefore, &c.; *held*, that this plea was not the plea of an escrow.

Nor did the plea aver any such fraud in the obtaining the instrument, as to render it void as to the defendants pleading it; the fraud was committed on the sureties by the principal, and not by the state; and as the sureties trusted the principal, they must suffer the consequences.

If a principal, in procuring one to become his surety, commits a fraud upon the surety, either in suppressing or misstating facts, and the creditor has no knowledge of and gives no assent to the fraud, the surety will be liable to the creditor.

To an action on a bond against the sureties of the principal, two of the sureties plead that they had delivered the bond to the principal, as an escrow, to be obligatory on condition that two others should execute the same, who had never done so. It was proved that the principal stated to one of these sureties that the two others should sign it as co-sureties, to which the defendant replied, if they would execute the bond he would, and accordingly did so; the cause, upon this pleading and proof, was submitted to a jury, who found against the sureties; *held*, that their verdict was in accordance with the law and evidence; the bond, under the pleading and proof, was not delivered as an *escrow;* to constitute an escrow the delivery must be to *a stranger* (not to one of the parties) to be held by him until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed.

Where in an action against the treasurer of the state for defalcation in his office, there was a verdict rendered by the jury on his official bond against him and his sureties for the amount shown to be due by him, and the bill of exceptions did not show what kind of funds were received by the treasurer, nor from what sources they were received, it was *held* that this court would not inquire into the question whether the funds were received by the treasurer in pursuance of law, or not.

In error from the circuit court of Carroll county; Hon. Benjamin F. Carruthers, judge.

Tilghman M. Tucker, governor of the state, and successor in office of Alexander G. McNutt, sued Richard S. Graves, Elijah Graves, James Bond, John Middleton, Valentine Harman, Edward Williams, Thomas Hogg, William Perry, Henry P. Barnes, Mabin Barfield, and Richard W. Graves, upon their bond, in the penalty of eighty thousand dollars, dated November 20, A. D. 1841, conditioned as follows, viz.: "The condition of the above obligation is such, that whereas the above bound

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Richard S. Graves was, on the first and second days of November, 1841, duly elected by the qualified voters of the state of Mississippi, treasurer of said state of Mississippi, for the constitutional term of two years from the date of this bond and his oath of office hereon written; now, therefore, if the said Richard S. Graves shall, from time to time, and at all times, render a just and true account to the legislature of the state of Mississippi, when by them thereto required, of all moneys, securities, stock and other property of the said state which shall come to his hand, or be committed to his charge, and deliver the moneys, securities, stock and other property of the said state, in his hands, at the expiration of his term of office, together with all documents, instruments of writing, papers and books belonging to or for the use of said state, to his successor in office, and shall well and truly, honestly and faithfully, perform all the duties of his office, during his continuance therein, and shall answer for all unlawful appropriations, waste, embezzlement, or destruction of the said moneys, securities, stock, property, documents, instruments of writing, papers or books which shall be made, done or committed by him, or by any person or persons by him employed in said office, then this obligation to be void, otherwise to be and remain in full force and virtue."

The first breach assigned was, in substance, that on the 21st day of February, A. D. 1843, Richard S. Graves, in his official capacity, and by virtue of his office of treasurer, received and took into his possession certain moneys belonging to the state, to the amount of two hundred thousand dollars, for, and in the name and on the account of the state, and unlawfully appropriated and converted it to his own use.

The second breach stated, in substance, that on the 25th day of February, A. D. 1843, Graves, in his official capacity, received and took into his possession, for, and in the name and on account of the state, other money belonging to the state, to wit, fifty thousand dollars, which was a special fund, belonging to the state, commonly called the three per cent. fund, which it was by law Graves's duty, as treasurer, to reserve and keep for the use and benefit of the state, until otherwise directed by law,

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yet he did not so reserve and keep it, but fraudulently misapplied, and unlawfully appropriated it.

The third breach was to the effect that, on the 25th day of February, A. D. 1843, Graves took into his possession, as treasurer, for, and in the name and on account of the state, two hundred thousand dollars of a special fund belonging to the state, commonly called the two per cent. fund, which was by law appropriated to the construction of a railroad from Brandon, in the state of Mississippi, to the eastern boundary of said state, in the direction, as near as might be, of the towns of Selma, Cahawba, and Montgomery, in the state of Alabama, and could not lawfully be applied to any other purpose, yet Graves unlawfully appropriated it to his own use.

The fourth breach was that, as treasurer, Graves, on the 25th of February, 1843, received and took into his possession, for, and in the name and on account of the state, a large amount of valuable securities for the payment of money belonging to said state of Mississippi, to wit, the amount of one hundred and sixty-five thousand dollars, being treasury notes of the United States belonging to the state of Mississippi, received by Graves as treasurer, in payment of the first instalment of the two per cent. fund relinquished to the state by act of congress of September 4th, 1841, and accepted by act of the legislature of February 26th, 1842; which securities it was Graves's duty to keep and preserve, for the use and benefit of the state, yet Graves, after receiving them, unlawfully and fraudulently appropriated them to his own use.

The fifth breach was to the effect, that it was Graves's duty, well and truly, honestly and faithfully, to discharge the duties of his office for the prescribed term; yet, on the day of March, 1843, he abandoned his office and fled to parts unknown, and has ever since neglected and refused to perform his duties.

The sixth breach was, that it was unlawful for Graves to pay or receive money on account of the state, but on the warrant or certificate from the auditor of public accounts, yet Graves, on the 21st of February, 1843, received into the treasury of the state one hundred and sixty-five thousand dollars belong-

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ing to the state, without any warrant or certificate from the auditor, authorizing it.

The seventh breach states that it was Graves's duty, as treasurer, to furnish the auditor of public accounts monthly statements of the receipts in the treasury, &c., as required by law; yet Graves had wholly omitted to do so.

The declaration was filed to the October term, 1843, and at the return term the defendant, Perry, plead, 1. That at the time of his signing and sealing said bond he delivered the same to Richard S. Graves, the principal, as an escrow to be binding and obligatory on him (Perry) on the condition that two persons of solvency and wealth, sufficient to pay the full penalty, should sign, seal and deliver the same, besides those who had signed and sealed the same, and that those persons had not signed and sealed the bond, so the condition had not been performed.

That at the time he signed and sealed said writing, it was agreed and distinctly understood between this defendant and the said Richard S. Graves, that besides the persons who had signed and sealed said writing, two persons of wealth and ability sufficient to pay and discharge the penalty of said bond would sign, seal and deliver said writing as their deed, and would bind themselves to be liable to pay the same before recourse should be had against this defendant; and on this condition and by virtue of this agreement this defendant signed, and sealed said writing; and he further avers, that two blanks were left in said writing, which were to be filled with the names of those two persons above the signature of this defendant; and this defendant in fact says, that these persons never have signed or executed said writing, nor has any other person whatever, signed the same, who would be liable to pay and discharge the same before this defendant.

These pleas were verified by oath.

Thomas Hogg plead, that, at the time of signing and sealing said bond, he delivered the same to Richard S. Graves, to be held as escrow, and not to be binding on this defendant, but on condition that one Wilson Hemingway and Samuel Parker,

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should sign, seal and deliver the same as their proper act and deed; and that Hemingway and Parker, did not sign, seal and deliver, and have not signed, sealed and delivered the same as their proper act and deed; so that the condition remains wholly unperformed.

This plea was also supported by affidavit.

Valentine Harman plead a similar plea, except that he averred that Wilson Hemingway only was to sign the bond before it should be obligatory on him; he made affidavit to his plea.

John Middleton plead; 1. A similar plea to that of Hogg, that Hemingway and Parker were also to sign it before it should be obligatory; and 2. That Hemingway, Parker and eighteen others were to sign it before he should be bound; and the bond was delivered to Graves on that condition. Middleton made oath to the truth of these pleas.

Mabin Barfield plead and made oath to a similar plea, that he signed on condition, one —— Meban and other substantial men were to sign the bond, who did not do so.

Issues were taken to the country on these pleas. William Perry, H. P. Barnes, Mabin Barfield and Richard W. Graves, plead, "that John Middleton and Thomas Hogg had signed and sealed the said bond before it was presented to these defendants to be signed and sealed by them, and these defendants aver, that they signed and sealed the same, in the belief that the said Middleton and Hogg had executed the same as their proper act and deed, and these defendants aver, and in fact say, that the said Middleton and Hogg had delivered the said pretended writing obligatory to Richard S. Graves, the principal, therein to be binding on the said Middleton and Hogg, but on condition that one Wilson Hemingway and Samuel Parker should sign, seal and deliver the said pretended writing obligatory, as their proper act and deed; and these defendants aver, that the said Wilson Hemingway and Samuel Parker did not, and have not executed the said pretended writing obligatory, as their proper act and deed, by means whereof the said Hogg and Middleton are not charged by the said pretended writing obligatory; wherefore these defendants say that the said pre-

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tended writing obligatory is not their deed; and of this they put themselves upon the country," &c.

This plea was sworn to, the counsel for the state demurred to it, and the court below sustained the demurrer.

To the breach, averring the reception of the fifty thousand dollars of the three per cent. fund, the defendants replied that Graves, as treasurer, paid it out in cashing auditor's warrants, duly drawn upon him as treasurer. To this plea, the state demurred, and the demurrer was sustained.

Other pleas were filed to the various breaches set out in the declaration, denying the reception of the money by Graves as treasurer, as charged in the several breaches, denying his authority to receive the two and three per cent. funds, and averring that he never obtained authority from the governor to receive them; and averring payment of the sums charged to have been received. To the pleas alleging that Graves had no authority to receive the two per cent. fund, the state demurred, and the court below sustained the demurrer, and awarded *respondeat ouster;* under which order other pleas setting up payment were plead; and upon these and the other pleas issues were taken to the country.

Under the decision of the court it is not deemed requisite to set out these pleadings at greater length.

The cause was submitted at the October term, 1845, on the issues joined to a jury, the suit having been previously dismissed as to defendant Richard S. Graves, for want of service of process, and abated as to defendants Perry and Hogg, on the suggestion of their death; and the jury found against the other defendants in favor of the plaintiff, and assessed his damages at fifty-one thousand, eight hundred and sixty-five dollars and forty-seven cents.

Subsequently the defendant, John Middleton, moved for a new trial, because the jury found against the law and evidence on his special plea of *non est factum;* the motion was overruled and a bill of exceptions sealed, which recites, that "the said defendant excepts and tenders this his bill of exceptions, which embraces all the evidence which was submitted to the jury for their

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consideration under said special plea of *non est factum*. The plaintiff read in evidence the bond in the declaration described, and said John Middleton then called Washington Middleton, as his witness, who stated, that he was present when John Middleton signed the bond; that Richard S. Graves stated to said Middleton, that Samuel Parker and Wilson Hemingway would execute the bond as securities and other persons; that said John Middleton replied that if the said Parker and Hemingway would execute the bond, he would; and he accordingly signed and sealed it." This was the whole bill of exceptions.

The defendants sued out this writ of error.

Sheppard, for plaintiffs in error, contended,

1. The covenants of the sureties are to be construed and determined by the provisions of the law, defining and fixing the duties of the treasurer.

And to fix their liability for a waste or misapplication of a particular fund, it must clearly appear that, by law, such fund was intrusted to his keeping and custody, and that it was therefore his official duty to secure and account for it.

The sureties may stand on the strict letter and fair intent of their contract and covenant, and their liability will not be extended beyond it. *Miller* v. *Stewart*, 9 Wheat. 680.

2. The act of the legislature of 1842, accepting the relinquishment of the two per cent. fund, for the purposes expressed in the act of congress, by the 7th section, provides that the treasurer of this state, should draw on the treasurer of the United States, only for so much of this fund, as in the opinion of the governor should be required for the purposes of that act. Acts of Legislature of 1842, p. 122.

That the intention is obvious from the provision of the seventh section, that the two per cent. fund should not be deposited in the treasury of the state, but that it should continue to remain in the treasury of the United States, until it should be required to meet such appropriations, as, from time to time, might be made by the legislature in executing and carrying into effect the purposes of the act of congress.

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That the act of 1842 does not dispense with the necessity of obtaining a receipt warrant, in drawing the fund under the requisition of the governor. It could not be dispensed with by implication, but only in express words. How. & Hutch. 272.

That the legislature, by the act of 1842, imposing additional restrictions on the power of the treasurer, in obtaining a portion of the fund, most clearly manifested their intention, that under the general law, the treasurer should have no power to draw the whole fund.

3. That, in case of doubt as to the intention of the law in construction of a statute, that construction should be adopted which would conform with the general policy of the law.

That it is the obvious policy of the state, that ample security should be given for the safe keeping of the public moneys, and for this purpose the penalty of the treasurer's bond had been fixed at eighty thousand dollars, which was deemed sufficient, by the legislature, to secure the money then belonging to the state, and what might accrue from the ordinary sources of revenue. But the state acquired no title to the two per cent. fund, until the act of 1842 accepted the relinquishment made by the act of congress, and subsequent to the execution of Graves's bond.

It was, therefore, a matter of great interest to the state, that this fund should not be intrusted to the safe keeping of the treasurer, under the security of the bond which had been given, for this fund alone more than doubly exceeded the penalty of his bond. The state would have had no security for any amount beyond the penalty of the bond.

4. If the safe keeping and disbursement of the fund did not constitute a part of the official duty of the officers, then the sureties are not responsible for the defalcation. *Allison* v. *Farmers Bank*, 6 Rand. 204.

The third and fourth breaches are predicated on an alleged misapplication of the two per cent. fund; and the plea to these breaches alleged, that the treasurer had no power to receive it, and never obtained any requisition from the governor to obtain it. The court sustained a general demurrer to these pleas. The judgment, being against the views presented, was erroneous.

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5. The proof sustained the plea of escrow filed by John Middleton, and the court should have granted a new trial.

The case of *Pawling* v. *United States*, 4 Cranch R. 219, is direct authority, sustaining this position.

W. Yerger, on same side, contended,

1. That that the court should have granted Middleton a new trial, as his proof established, that he delivered the bond as an escrow; for an escrow could be delivered to the principal obligor. 4 Cranch R. 219; 2 Leigh R. 157. And the condition upon which the bond was so delivered in this case, was a valid one. *Sharp* v. *United States*, 4 Watts, 21; *Well* v. *Jones's Executors*, 1 North Car. Law R. 510; *Leaf* v. *Gibbs*, 19 Eng. Com. Law R. 475.

2. That the plea of Barnes, Barfield and R. W. Graves was a good one. He relied on the same authorities.

3. That the demurrer to the pleas charging the reception, without authority, by Graves, of the two and three per cent. funds, ought to have been overruled.

4. That the plea, that Graves cashed the proceeds of the three per cent. fund for auditor's warrants, was a good plea; for, even if he had no right to do so, it was *damnum absque injuria*, and the court ought to have overruled the demurrer to it.

Freeman, attorney-general, for the defendant in error, contended,

1. A bond, executed with the usual formalities, may operate as a deed *in presenti*, although at the time of such execution it was expressly agreed that it should not take effect until a certain event had happened; and the intention of the parties at the time of execution, is a question of fact for the jury on the whole evidence. 9 Eng. Com. Law R., 2 B. & C. 82; 2 Harrison's Digest, 2345, *Escrow; Leaf* v. *Gibbs*, 19 Eng. Com. Law R. 476.

2. It is for a jury to decide, whether a deed was ever delivered. *Fisher* v. *Kean*, 1 Watts, 278; 6 Serg. & Rawle, 208–314.

3. A delivery of a deed must be considered absolute, unless

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stated to be an escrow. 2 U. S. Digest, 30, § 90; *Currie* v. *Donald*, 2 Wash. 48; *Wheelright* v. *Wheelright*, 2 Mass. 447; *Hatch* v. *Hatch*, 9 Mass. 307.

4. A deed actually delivered by an agent to one for whom it is made, is no longer an escrow, though placed in the hands of such agent, under an agreement that it should be considered an escrow. *Simonton's Estate*, 4 Watts, 180.

5. A verdict will not be set aside as against evidence, when there has been evidence on both sides, and no rule of law violated, nor manifest injustice done, although there may appear to have been a preponderance of evidence against the verdict. Graham, 380–385, et seq. A new trial will not be granted when the presiding judge is satisfied with the verdict, although contrary to the weight of evidence. Graham, 405–408.

6. Mr. Freeman replied at length to the ground assumed, that the treasurer had no right to receive the two per cent. fund, and insisted, that under the law and constitution, he had full power, and it was his duty to do so. He cited the acts of 1842, approved Feb. 26, § 1 and 4; How. & Hutch. 273, § 17.

7. He also contended, that the cashing of the three per cent. fund by Graves, for auditor's warrants, was a violation of the laws of the state, which specially appropriated that fund; and the demurrer was, therefore, properly sustained to the plea averring that defence.

George S. Yerger, for plaintiffs in error, contended,

1. That the plea of Barnes, Barfield and R. W. Graves, was a good one. No affidavit was required to the plea at all. It is not a plea of "*non est factum*," but a special plea of fraud. The authorities show that Middleton was not bound. 4 Cranch R. 219; 3 Leigh, 157; 19 Comm. Law Reports, 475; 1 North Car. Law Rep. 510; 4 Watts R. 21.

Fraud vitiates the instrument, so that it is, in fact, not the deed of the party, that is, fraud in the execution, not in the consideration; and fraud in the execution may be given in evidence under *non est factum*. Whether there be fraud in the execution on consideration, our statute allows it. How. & Hutch. 589;

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Van Valkenburgh v. *Rouk*, 12 John. R. 337; *Dorr* v. *Manne*, 13 John. R. 430; *Dale* v. *Roosevelt*, 9 Cowen, 309; 6 Munford, 358; 4 Wendell, 473; 8 Cowen, 290; 5 Cowen, 506.

But this is a special plea; the facts are set out which make it a fraud; it is, therefore, a special plea of fraud. And the rule is settled, that, whatever would be good under *non est factum*, may be specially pleaded. 1 Harris & Gill, 324; 1 Metcalf's Digest, 461, 696, et seq.

2. The plea of *non est factum*, as to Middleton, was sustained by the evidence. 4 Cranch R. 219; 2 Leigh, 157; 19 Com. Law R. 475; 1 North Car. Law R. 510; 4 Watts, 21.

3. The verdict is erroneous as to him, and being joint, must be set aside as to all. 18 Pickering, 418; *Richard* v. *Walton*, 12 John. 434; *Holbrook* v. *Murray*, 5 Wendell, 161; *Hall* v. *Williams*, 6 Pickering, 247; *Arnold* v. *Sandford*, 14 Johns. 424; 1 How. R. 333, 527; 2 Ib. 786; Meigs's R. 578.

4. If a plea is demurred to, and demurrer sustained, and *respondeat ouster* awarded, after verdict the court will decide on the validity of the first plea. *Ellis* v. *Martin*, 2 S. & M. 187; *Gwin* v. *M'Carroll*, 1 S. & M. 351. If, therefore, any of the pleas to which demurrers were sustained were valid, the judgment must be reversed.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an action of debt on the official bond of Richard S. Graves, as the treasurer of the state, for the penal sum of eighty thousand dollars.

Two errors have been principally relied on in argument, to reverse the judgment of the court below.

The first is, that the demurrer to the plea of William Perry, H. P. Barnes, Mabin Barfield, and Richard W. Graves was improperly sustained. That plea states "that John Middleton and Thomas Hogg had signed and sealed the pretended writing obligatory, before it was presented to them to be signed and sealed by them, and they aver that they signed and sealed the same, in the belief that the said Middleton and Hogg had executed the same as their proper act and deed, and they aver that

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said Middleton and Hogg had delivered the said pretended writing obligatory, to Richard S. Graves, the principal therein, to be binding on the said Middleton and Hogg, but on condition that one Wilson Hemingway and Samuel Parker should sign, seal and deliver the said pretended writing obligatory, as their proper act and deed, and they aver that the said Hemingway and Parker did not, and have not executed the said writing obligatory, as their proper act and deed, by means whereof the said Hogg and Middleton are not charged by the said pretended writing obligatory, wherefore they, the said Perry, Barnes, Barfield and Graves say, that the said pretended writing obligatory is not their deed, and of this they put themselves upon the country."

This plea, in substance, alleges, that Middleton and Hogg had executed the bond as an escrow, that the other defendants had executed it under the belief that it was absolute, and that they, therefore, are not bound.

The plea amounts to a special *non est factum*, resting for its efficacy upon fraud, in the execution of the instrument. It is not a plea of an escrow, for it does not aver that they executed the bond upon any condition whatever. That averment is indispensable to the plea of an escrow. Then is any such fraud averred in the obtaining of the instrument, as will render it void as to the defendants who rely on this plea. It does not allege that Richard S. Graves made any representation to them on the subject; his silence is the alleged ground of fraud. He did not communicate to them, that the signatures then attached to the bond, were placed there upon an unfulfilled condition. This is the ground of complaint. But if there were any fraud in this, Richard S. Graves, the principal obligor was the guilty agent, not the state of Mississippi. He was, by these defendants placed in a situation in which he practised a fraud upon the state, if they can be released. If the state is as blameless as they are, they must bear the burden, because they put it in the power of Graves to practise the fraud. They trusted most, and they must suffer most; they do not pretend that the officers of the state had any knowledge of the fraud complained of.

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The law upon this subject is very plain. A late writer thus lays it down; "fraud by the creditor, in relation to the obligation of the surety, or by the debtor, with the knowledge or assent of the creditor, will discharge the surety from his liability." Burge on Suretyship, 218. This principle has been recognized as sound law, in a recent English case, and the knowledge or assent of the creditor is the criterion for determining the liability of the surety. The court says, "the plaintiffs are not to be made responsible for the communication or want of communication between their debtor and the surety, unless they are shown to be agreeing to it." If with the knowledge or assent of the creditor, any material part of the transaction is misrepresented to the surety, the security so given is void at law, on the ground of fraud." *Stone* v. *Compton*, 35 Eng. Com. Law R. 64; S. C. 5 Bing. N. C. 142.

We think, therefore, there was no error in sustaining the demurrer to this plea; and that the plea interposed no valid defence, without an averment, that the state had knowledge of, or consented to the fraud alleged to have been practised by the principal.

After the demurrer was sustained, the cause was submitted to the jury upon the issues joined, and a verdict rendered for the plaintiff for $51,865.47. The next error insisted on is, that the court refused to set aside this verdict, and grant a new trial.

Two of the defendants, Hogg and Middleton, had pleaded "that they had delivered the bond to Richard S. Graves, the principal obligor, as an escrow, to be binding and obligatory on condition that Wilson Hemingway and Samuel Parker should execute the same, and that said Hemingway and Parker had never executed it." The only evidence on this subject was that of a witness, who stated, "that he was present when the defendant Middleton signed the bond; that Richard S. Graves stated to said Middleton, that Samuel Parker and Wilson Hemingway would execute the bond as securities, and other persons; that said Middleton replied, that if said Parker and Hemingway would execute the bond, he would, and he accordingly signed and sealed it." Middleton moved for a new trial, because the

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verdict was against the law and evidence, and the verdict and judgment being joint, if reversed as to him, must be reversed as to all.

On this part of the case, the only question is, whether the evidence establishes the delivery of the deed as an escrow. The law on this point is nowhere better laid down, than in Sheppard's Touchstone, 58. He says, "the delivery of a deed, as an escrow is said to be, where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made." The author then goes on to set out the form of words, which must be used at the time of delivery, to prevent the operation of the deed as an absolute instrument. The other elementary writers adopt this doctrine without qualification. 4 Cruise Dig. 32; Comyn Dig. Fait. A. 3, notes; 2 Lomax Dig. 29. The decided cases, too, hold an uniform language on this subject; to make a deed an escrow, the delivery must be conditional. *Jackson* v. *Catlin*, 2 John. 258; *Blume* v. *Bowman*, 2 Iredell, 342; *Evans* v. *Gibbs*, 6 Humph. 407; 4 Watts, 181. There is a lucid exposition of the rule in the case cited from 6 Humphreys. "The sealing and signature not being denied, it is incumbent on him who alleges it to be an escrow, to prove affirmatively, not that the principal promised something farther should be done, by way of inducement to his execution of the instrument, but that the performance of such further act was the condition upon which he was to become bound, or the instrument to be delivered as his act and deed."

The cases cited for the plaintiffs in error do not hold a different doctrine; they relate to the application of the rule, not to the rule itself. Thus in *King* v. *Smith*, 2 Leigh, 157, "King signed the bonds and delivered them to the marshal, upon the express condition, that Waite should also sign them as surety,

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and if he refused to do so, that the bonds should not be obligatory on King." The court held, that the condition made the instruments only escrows. In *Sharp* v. *The United States*, 4 Watts, 21, the defence was, "that the act of congress recited in the bond, authorized the collector to take a bond with two or more sureties, and that a bond taken with but one surety was void." The bond had the name of two sureties in the body, but was signed by only one. It was held, that the surety who signed had a right to believe that the bond would be taken in strict conformity with the law, and that the other party named, would also sign. His signature was conditional." Whether that court drew the correct inference from the facts, is not the question; it recognized the rule of law, as hereinbefore stated. Of the same character is the case of *Fitz* v. *Green*, 3 Dev. 291, where a guardian was required to renew his bond, with two persons named as his sureties. One of them executed it and left it with the clerk. The court held that the bond had been delivered only as an escrow, and that the party had declared, through the mouth of the court, that the bond was not to be accepted, until the other had executed it. The case was decided on the ground that there was no evidence of a delivery. The case of *Webb* v. *Jones*, 1 Car. Law R. 510, is of the same nature. *Leaf* v. *Gibbs*, 19 Eng. Com. Law R. 475, was a case of fraud. The agent of the plaintiffs told the defendant, that his mother was to join in the note, and, therefore, said the court, "the obtaining of his signature was a condition, which, if not performed, would justify the defendant in withdrawing." It was left to the jury to say if the defendant had waived the objection. But this case falls within the rule laid down in *Stone* v. *Compton*, above cited, and is not applicable here, unless the representation had been made by the state, through its officers or agents.

These cases all show, that whether the deed were delivered upon a condition or not, is a question of fact, upon the determination of which depends the judgment. In this case, this question was submitted to the jury, without any instruction from the court. Their verdict, so far from being contrary to the law and the evidence, is, in our view, in accordance with both.

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An ingenious argument has been made, to show that the funds received by the treasurer and not accounted for, were not received by him in pursuance of law, and by virtue of his office of treasurer, and that his sureties are not, therefore, bound for the amount. It is a sufficient reply to this, to state, that the bill of exceptions does not contain any testimony on this point, nor show what kind of funds were received by the treasurer. In the absence of such proof, the verdict must be considered correct.

The judgment is affirmed.

LEVI CHILDRESS *vs.* EVERETTE L. FORD.

All the instructions given by the circuit court on the trial of a cause must be construed together; and if, when taken altogether, the law be correctly given, the judgment will not be reversed because a single instruction taken by itself, would be too broad in its terms.

Therefore, where in a trial of right of property involving the question whether the sale to the claimant was fraudulent, the court instructed the jury, that if they believed the sale made by the defendant in execution to the claimant was intended wholly or in part to defraud, hinder, or delay creditors, the conveyance was void; but had previously instructed the jury that unless the claimant participated in the fraud of his vendor they must find for him; it was *held*, that if the one instruction were too broad, its error was corrected by the other.

On a trial of the right of property levied on under execution, the circuit court instructed the jury that they might take into consideration facts which took place after the purchase by the claimant, which went to explain the intent of the parties to the sale when it was made; *held*, that the instruction was not erroneous.

The sanctity of the trial by jury requires that the jurors should be impartial and unbiased, and if it is afterwards ascertained that they were not so, the verdict should be set aside.

Where, therefore, in a trial of the right of property to slaves, levied on under execution, one of the jurymen had stated, previously to the trial, that the sale from the defendant in execution to the claimant was fraudulent, and the slaves should be made liable to the execution; and on the impanelling of the jury, the jurors were asked if they had formed and expressed opin-

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ions against the validity of the claimant's rights, and they had all answered in the negative; and the claimant made oath that he was ignorant until after the trial of this expression of opinion by one of the jurors; it was *held*, that the verdict should be set aside and a new trial granted.

A different rule would perhaps prevail if the party chose to go to trial without examining the jurors.

In error from the circuit court of Choctaw county; Hon. Francis M. Rodgers, judge.

Everette L. Ford, on the 17th day of September, 1845, recovered a judgment against James Cameron for $751.02, and on the 12th of November, 1845, levied an execution thereon, on two negro men who were claimed by Levi Childress, according to the statute.

At the March term, 1846, of the Choctaw circuit court, an issue was made up to try the right of property, and at the succeeding term the case was tried, and a verdict rendered in favor of Ford, the plaintiff in the execution.

A motion for a new trial was made; 1. Because the jury found contrary to the law and evidence; 2. Because the court misdirected the jury: 3. Because of the partiality of the jury.

It is not deemed requisite to detail the testimony on either side, as the opinion of the court was not predicated on it.

The counsel for Childress moved the court to instruct the jury, that fraud is not to be presumed, but must be proven, and that unless the jury believe from the evidence that the contract of purchase was made by the claimant in fraud, they must find for him; that whatever they may believe of the fraudulent intent or ignorance of the defendant, Cameron, unless they believe from the evidence that Childress was a party to, and participated in the fraud, they must find for the claimant; that no subsequent conduct can render the original contract fraudulent; and that the law is, when a party introduces the declarations of the adverse party, they are bound by the proof, unless the same is contradicted. These instructions were given.

The counsel for Ford asked the court to instruct the jury: 1. When the vendor of personal property remains in possession

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of such property after the sale, such possession is *prima facie* fraudulent.

2. That the possession of the vendee to avoid the above stated rule of law must be exclusive, and a mixed possession by the vendor and a son of the vendee is not such change of possession as to avoid the presumption of fraud.

3. If the jury believe that the sale, made by Cameron to Childress, was made either wholly or in part to defraud, hinder, or delay the creditors of Cameron, then the conveyance is wholly void as to the creditors of Cameron.

4. If the jury believe that the contract was fraudulent, they must wholly disregard such contract in the investigation of this cause.

5. If the jury believe, from the evidence, that Cameron made the conveyance to Childress, for the purpose of hindering, defrauding, or delaying his creditors, and that Childress knew or believed that such was Cameron's intent, then they must wholly disregard the conveyance.

6. If the jury believe, from all the testimony and circumstances of the case, that the deed made by Cameron to Childress was made for the purpose of hindering, delaying, or defrauding the creditors of Cameron, the deed would be void as to the plaintiff in execution.

7. That circumstances alone may outweigh positive proof, and establish fraud as fully as it could be done by the most positive and direct proof.

8. That the jury can take into consideration facts which took place after the trade, which go to explain the intent of the parties, when they made the trade.

The court gave all but the seventh instruction, and the claimant excepted. On the hearing of the motion for a new trial, the affidavit of Childress was read, which states in substance that since the trial he had learned that Henry T. Mullen and David Daniel, two of the jurors, had formed and expressed their opinions before the trial adversely to his right of recovery; that they had both stated that they believed the sale from Cameron to him was a sham sale, and ought to be set aside. That before

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the jury were sworn, his counsel called upon each, to know if they had formed or expressed any opinion upon the matters to be submitted to them, to which they all replied in the negative; and that he had been ignorant of their previously expressed opinion until after the trial. The affidavit of Charles Matthews was also read; he stated, that he had on several different occasions, heard Henry T. Mullins say that the purchase made by Childress from Cameron was a fraudulent and sham purchase, and that the slaves levied upon ought to be made liable to the execution; and that he had heard David Daniel say the same things prior to the then term of the court, at which the trial was had.

The new trial being refused, Childress appealed.

Acce, for appellant, insisted,

1. That the instructions given for the plaintiff in execution were erroneous. He cited *Wheaton* v. *Sexton's Lessee*, 4 Wheat. 503; *Gregg Lessee* v. *Sayre and wife*, 8. Pet. 244; *Wright & Cooke* v. *Stanard*, 2 Brock. C. C. Rep. 311; How. & Hutch. Dig. 371, § 3; *Harney* v. *Pack & Clifton*, 4 S. & M. 258; *Foster* v. *Hall*, 12 Pick. 89; *Clark* v. *Johnson*, 5 Day's Rep. 373; *Edgehill* v. *Bennett*, 7 Ves. R. 537.

2. That on the facts proved, Childress was entitled to a new trial.

3. That the preëxpressed opinions of the jurymen vitiated their verdict, and it ought to have been set aside. *McKindley* v. *Smith*, Hard. Rep. 167; *Vance* v. *Hastell*, 4 Bibb's Rep. 191; *Hernden* v. *Bradshaw*, 4 Bibb, 45; *Craigg* v. *Elliott*, 4 Bibb, 272; *Pierce* v. *Bush*, 3 Bibb, 347; *Jeffries* v. *Randall*, 14 Mass. 205; *United States* v. *Fries*, 3 Dall. Rep. 515.

Jackson, on the same side, relied on the last point taken.

William and *William G. Thompson*, for appellees, contended, that the verdict should not be disturbed; the whole record showed it was right. They cited Meigs's Rep. 167, 262–264.

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Mr. Chief Justice SHARKEY delivered the opinion of the court:

Ford, the defendant in error, had recovered a judgment against James Cameron, for seven hundred and fifty-one dollars, on the 17th of September, 1845, and on the 12th of November, 1845, had his execution levied on two negro men, which were claimed by Childress, who gave a bond to try the right according to the statute. A trial was had on issue joined, which resulted in a verdict that the negroes were liable to Ford's execution, and that the claim of Childress was fraudulent. During the progress of the trial, a bill of exceptions was taken to the charges of the court, which also embodies the evidence. After verdict, the claimant moved for a new trial, and excepted to the opinion of the court in overruling his motion. The grounds relied on for a new trial were, first that the verdict was contrary to law and evidence; second, because the court misdirected the jury in the instructions set out in the first bill of exceptions; and third, because of the partiality of part of the jury.

We are not prepared to say that the verdict was contrary to law or to the evidence. On the contrary, it seems to be in strict accordance with both.

But it is insisted, that a new trial should be granted because the court erred in giving the third and sixth instructions asked by the plaintiff in execution. The third charge was, that if the jury believed the sale made by Cameron to Childress was intended wholly or in part to defraud, hinder or delay creditors, the conveyance was void. The sixth charge contains the same proposition in substance. To these it is objected that they were too broad; that the sale was not void unless Childress was a participant in the scheme. We shall not controvert the doctrine, that a *bona fide* purchaser without notice, who has parted with his money, and has taken an absolute conveyance, will be protected in his purchase, although his vendor may have made the sale to hinder or delay creditors. But we find that the jury had been fully informed on this subject by the previous instructions given at the instance of the claimant, in which the court used this language, to wit, "that unless the jury believe from

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the evidence, that the contract of purchase was made by the claimant in fraud, they must find for him. That whatever they may believe of the fraudulent intent or ignorance of the defendant Cameron, unless they believe from the evidence that Childress was a party to, and participated in the fraud, they must find for the claimant." The jury were thus distinctly informed in the outset, that Childress must have participated in the fraud, and the subsequent instructions were given in view of this principle of law. The charges must be construed together, and when all that the court said is taken into consideration, the principles of law were not extended too far.

The eighth instruction is also objected to. It is in these words, to wit, "that the jury can take into consideration facts which took place after the trade, which go to explain the intent of the parties when they made the trade." To this there can be no valid objection. This was not a resort to subsequent facts to vitiate the trade, but to show the intention which operated on the parties when the contract was made.

The last ground taken in support of the motion for a new trial is, that two of the jurors had formed and expressed opinions against the validity of the claimant's right. By his own affidavit, the claimant shows that he was ignorant of this fact until after the trial. He also shows that before the investigation commenced, each juror was called upon to state whether he had formed and expressed an opinion. It is shown by the affidavit of a third person, that one of the jurors had been repeatedly heard to declare, that the sale made by Cameron to Childress was fraudulent, and that the negroes levied upon ought to be made liable. For a similar expression of opinion, a new trial was granted in the case of *Cody* v. *The State*, 3 How. 27. And in the *United States* v. *Fries*, 3 Dallas, 515, a new trial was granted because one of the jurors had, before the trial, expressed his opinion as to the guilt of the prisoner. The sanctity of the trial by jury, requires that the jurors should be impartial and unbiased, and if it is afterwards ascertained that they were not so, the verdict should be set aside. We mean for the present only to apply this rule where, as in the present

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case, the proper inquiries have been made to ascertain whether the jurors were competent. If a party chooses to go to trial without examining the jurors, the effect may be different.

Judgment reversed, and new trial awarded.

WILLIAM JENKINS et al. *vs.* MARK A. GILLESPIE.

The general doctrine that an attorney may submit a matter in dispute to arbitration, is limited to the case where there is a cause pending which he has been employed to manage.

Therefore where W. J. and N. J. and G. signed a written agreement to submit a matter in controversy between them to the arbitrament of seven persons, and afterwards it was agreed in writing, signed only by W. J. and G., that five persons should act instead of seven, a majority of whom should be authorized to make the award, and accordingly an award was made by them, two dissenting; it was *held*, that N. J., who was not a party to this agreement, but whose attorney at law assented to it, without express authority so to do, was not bound by the award.

Even admitting that an attorney has, in general, power to submit the cause of his client to arbitration, yet it seems he has no power to change the terms of submission made by the parties, where it does not appear, whether he was employed before or after the submission; nor to what extent his authority went.

APPEAL from the circuit court of Amite county; Hon. V. T. Crawford, presiding judge.

A controversy having arisen between Mark A. Gillespie, of the one part, and William and Nancy Jenkins of the other part, as to whether certain slaves, held by the said William and Nancy were subject to a judgment, which said Gillespie had obtained against one Moses Whittington, the parties agreed to submit the matter to the arbitrament of seven persons, a majority of whom might make the award. Afterwards it was agreed between Mark A. Gillespie and William Jenkins, that there should be, instead of seven, only five arbitrators, a majority of whom might make the award. This last agreement

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was not signed by Nancy Jenkins. An award was made by a majority of the five arbitrators, (two dissenting) acting under this agreement, in favor of Gillespie; was returned to the circuit court of Amite county; and judgment was given thereon, by that court in his favor, and the sum of fifty-two dollars and eleven cents, was also adjudged to him for his costs and charges.

The defendants moved the court for arrest of said judgment: because Nancy Jenkins one of the defendants, was not a party to the award; and had not notice of this proceeding; and because the judgment was contrary to law and evidence; which motion was overruled, and a bill of exceptions taken.

It is necessary to notice only the deposition of James M. Smiley, that he was the attorney at law and counsellor of Nancy Jenkins and William Jenkins the defendants; that he saw William Jenkins, one of the defendants, and Mark A. Gillespie, the plaintiff, sign the original agreement to submit the difference between the plaintiff and defendants to arbitration, filed in the case, and dated the 5th day of June, 1844; that he was present at a meeting of some of the parties and arbitrators, and as attorney for both defendants, consented to the modification of said agreement, as made on the 24th July, 1845, by which it was agreed that the matter might be submitted to the arbitration of five persons. That he was present and saw William Jenkins and Mark A. Gillespie sign and seal the modification; and witness, as attorney and counsellor for defendants, agreed to the modification.

The defendants appealed.

J. M. Smiley, for appellant.

1st. It was error to render judgment against Nancy Jenkins, she not having signed the agreement changing the number of arbitrators from seven to five.

The change of agreement amounted to a new agreement, and Mrs. Jenkins who did not sign it, cannot be made liable under it any more than any other stranger to said agreement.

2. It does not alter the case, that the attorney assented to the

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change of agreement. The attorney had no authority to change the agreement, and did not presume to do so. The change of the agreement amounted to a dismissal as to Nancy Jenkins, and to that, her attorney could not do otherwise than assent. *Hand et al.* v. *the President and Selectmen of the Town of Columbus*, 4 S. & M. 203.

L. Lea, for Appellee.

1. It has been frequently held, that an attorney's agreement to refer, binds his client without any special authority. *Somers* v. *Balalrega*, 1 Dall. 164; *Holker* v. *Parker*, 7 Cranch, 436; *Buckland* v. *Conway*, 16 Mass. 396; *Talbot* v. *McGee*, 4 Monroe, 377. The case of *Hand et al.* v. *The President and Selectmen of the Town of Columbus*, 4 S & M. 203, is not in point. There, it did not appear that the defendants agreed to the reference either in person or by attorney.

2. In England, it has been decided, that an attorney has power to submit a cause to arbitration, and thereby bind his client, although he expressly desired the attorney not to consent to a reference. The client's only remedy in such case, being by an action against the attorney for damages. *Thomas* v. *Hews et al.* 2 C. & M. 527, et seq.; *Filmer* v. *Dolber*, 3 Taunt. 486; 1 Chit. 193.

3. If an attorney can bind his client by a reference in the first instance, without and against the client's consent, *a fortiori*, he has power to modify the terms of submission, where the client has agreed to refer. And so it has been held, that an enlargement of the time for an arbitrator to make his award by consent of the attorney, will bind his client. *Rex* v. *Hill*, 7 Price, 630.

Per Curiam. It seems that Gillespie, claimed the right to subject certain negroes in possession of, and claimed by, Nancy Jenkins, to an execution in his favor against one Whittington, on the ground of a liability which had attached before the said Nancy acquired title.

In order to settle the matter amicably, the parties agreed to

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submit it to the arbitrament of seven persons, and accordingly all signed an agreement for that purpose, in which it was also agreed that it should be made a rule of court, on which judgment should be entered according to the award.

Subsequently it was agreed in writing, signed only by William Jenkins and Gillespie, that five persons should act instead of seven, a majority of whom should be authorized to make the award, and accordingly an award was made by three, two dissenting.

Nancy Jenkins was not a party to this last agreement, unless she is bound by the assent of her attorney at law, James M. Smiley, who states that he was attorney for Nancy Jenkins, and assented to the modification of the submission; and the question is, whether Nancy Jenkins is bound by the award.

The general doctrine is that an attorney who is employed in a suit, may submit the matter in dispute to arbitration, because he may do anything, by the implied assent of the client arising from his employment in the suit which the court may approve in the progress of the cause. Kyd on Awards, 27. The reason of the rule shows its limit. There must be a cause pending which the attorney is employed to manage. This was a submission made under the statute, when no suit was pending. In such cases the matter is not necessarily placed in the hands of an attorney. It is out of the line of his appropriate duty, and to make such a submission binding, he should have express authority. Smiley does not say that he had any such authority. But admitting that an attorney has in general power to submit, has he power to change the terms of submission made by the parties? That is changing their contract. Smiley, does not say whether he was employed before or after submission; or to what extent his authority went. Under such circumstances, we think it would be going too far to say that his assent to the change was binding on his client.

Judgment reversed.

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Willis Banks *vs.* Richard Evans.

It seems that a court of chancery has jurisdiction of a bill to have a deed cancelled, which is alleged to constitute a cloud upon the complainant's title; as where two persons have each purchased the same lands under judgments against the same defendant, and have received deeds respectively thereto, one of them may file a bill to cancel the deed of the other, on the ground that he has the better title; in such case the complainant must, in order to prevail, establish clearly the facts which annul the purchase of the defendant; the court will not, upon a doubtful state of case, set aside a legal title.

Whether an execution which issues on a satisfied judgment is void or only voidable, and whether a sale of lands under it is void, or only voidable, *quære?* Whether void or not, it is certain that the *lien of the judgment* is discharged by the payment of the judgment; and a sale under an execution on such paid judgment, if valid at all, cannot relate farther back than the time when the execution went into the hands of the sheriff.

Where property was sold under several executions, and the sheriff's deed recited a particular execution, among others, as one under which the sheriff sold; and a purchaser of the same property at marshal's sale sought, by bill in equity, to have the sheriff's deed cancelled, and alleged as one ground therefor, that the particular execution recited in the sheriff's deed, was paid before the sale, and was not in the sheriff's hands at the time of sale, and the sheriff's vendee alleged his belief that the execution referred to *was* in the sheriff's hands at the time of sale by him, and there was no evidence to support the allegation of the complainant; it was *held* that the complainant had failed to make out his case, or to impeach the defendant's title.

Where property is sold under several executions, if the proceedings in one case be regular the sale will be valid, though all the others be irregular and vicious.

Where an execution was returned by the sheriff, "*money not made;*" but no indulgence on the part of the plaintiff in execution appeared, or negligence in the management of his execution, it was *held* that the mere omission of the sheriff to do his duty, whereby he made himself liable for the debt to the plaintiff in execution, would not postpone the lien of the plaintiff's judgment.

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It seems that it is not a valid levy of an execution upon personal property, if it is not taken into the possession of the sheriff; where, therefore, a sheriff, having various executions against J., went to J.'s plantation, and saw a quantity of cotton at J.'s gin, supposed to be about seventy-five bales, and was told by J. that he had seventy-five bales more in a warehouse at a distant point which the sheriff did not see; and the sheriff took no part of either lot of cotton into his possession, and never sold either, but J. shipped and sold them; and the sheriff returned that he had *levied* the executions on this one hundred and fifty bales of cotton; it was *held* that the facts did not amount to a *levy* on the cotton.

A levy upon sufficient personal property is not an actual, but only a *prima facie* satisfaction of the judgment; if legally removed, or removed without the intervention or act of the plaintiff in the execution, it is not a satisfaction. It seems a levy on personal property is never deemed a payment, except in those cases where, if it were not, the defendant would be twice deprived of his property on the same judgment.

The general authority of an attorney at law, as such, does not extend so far as to enable him to release property levied on, under execution; and it seems, therefore, that if an attorney at law release a levy upon personal property, such levy and release will not be a satisfaction of the judgment, nor a postponement of its lien.

This was a case depending upon the fact, whether a particular judgment, under which the property in controversy was sold, was paid before sale; if paid before sale the purchaser's title would have been inferior to that of the claimant; the facts are reviewed, and the conclusion reached, that the execution was *not* paid before the sale; yet, inasmuch as the facts were complicated, and the record not as perspicuous as it might have been, the claim of the defeated party was dismissed without prejudice to any rights which he might afterwards wish to assert.

The title of a purchaser at sheriff's sale cannot be affected by the return of the sheriff, made subsequent to the sheriff's deed to the purchaser.

The doctrine that, where there is a misapplication of money made on executions by the sheriff, the judgment, which is *entitled* to the money, is *satisfied* thereby, must be limited to the case where *all the executions have been levied* on the property sold, and the sale has taken place under all; it has no application to executions not *actually levied*.

It seems that where a sheriff has several executions of *fieri facias* in his hands, a levy of one is *not* a levy of all. He may levy some on personalty, some on realty, and not levy others at all.

On appeal from the vice-chancery court at Columbus; Hon. Henry Dickinson, vice-chancellor.

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On the 18th of May, 1842, Richard Evans filed his bill in the district chancery court, against Willis Banks, stating, that at the June term, 1839, of the United States district court, held at Pontotoc, Andrew Armstrong, who sued for the use of Prince and Garrett, recovered a judgment for $2875.93, besides costs of suit, against John H. Irby, George M. Mullin, Richard Evans, John S. Chandler, Francis W. Irby, Henry Barrow and Daniel W. Jordan; an execution on it was levied upon negroes, and a forthcoming bond executed by all the defendants, except Richard Evans, which was forfeited on the second Monday of November, A. D. 1839. On this bond a *fieri facias* issued, and was levied on the 15th of April, 1840, on the land in controversy, which was purchased by Richard Barry; on 14th September, 1840, Barry deeded the land to complainant. On 15th June, 1840, the sheriff of Lowndes county sold said land to Willis Banks of Alabama, under two executions, one against Daniel W. Jordan, in favor of Benjamin Clarke, and one against said Jordan, Francis W. Irby, and John S. Chandler, in favor of Edward Sims, and gave a deed therefor to Banks. That by virtue of this deed said Banks claims paramount title to said land, and threatened to bring suit, but does not do so. Complainant being in possession, cannot have an action at law to try the title.

The bill denies that the sheriff held any execution in favor of Clarke against Jordan; states that no judgment was rendered to warrant such an execution; and that, though an execution did erroneously issue, it was returned satisfied. That said execution was on a proceeding of *habeas corpus* brought by Clarke against Jordan, and which terminated, in fact, against Clarke; Jordan being ordered to pay costs of entering proceedings, estimated at about $1.50. That more than twelve months had elapsed since the rendition of this judgment, and it ought to have been revived by a *scire facias;* at least, it had lost its priority. That the execution in favor of Sims is pretended to be based on a forthcoming bond, forfeited 1st July, 1839; prior to the forfeiture of the bond under which complainant claims. That, admitting this to be true, the right of priority was lost

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by the laches of plaintiff. That an execution issued on said forfeited bond, from October term, 1839, of the circuit court of Lowndes county, returnable at the April term, 1840, of said court, and that under this execution, and others then in the hands of the sheriff, personal property of Jordan was levied on of more than double the amount of all executions then in the hands of the sheriff. That a part of the negroes then levied on, and more than sufficient to satisfy Sims's execution, still remain unsold. That in favor of this execution other large levies were made on the property of Jordan, and Jordan, under cover of them, was permitted to move a part of this property out of the state in fraud of prior judgments. That on the 6th March, 1840, the said execution of Sims was levied on nine negroes of Francis W. Irby, a co-defendant with Jordan. That by the directions of the attorney of said Banks, the sheriff permitted said Irby to convey his negroes into Alabama. That in February, 1840, said execution, with others, was levied on a large quantity of baled cotton, the property of Francis W. Irby, which was sold and bid off by the attorney of Banks, which was never paid for, nor any credit given on said execution, nor any other against Irby. That said cotton was conveyed out of the state under cover of said sale, and was more than three times enough to pay the amount due on said execution, mentioned in the deed of sale to Banks. That notwithstanding these levies said execution was returned unsatisfied. All which appears by the levy book kept by the sheriff.

The bill further avers, that after this another levy was made under this execution on personal property of the defendants thereto, more than three times enough made to satisfy the execution, which was permitted by Banks to be appropriated to executions to which it did not belong, except three or four hundred dollars which was paid into court, to be by it appropriated, and which remained still to be appropriated. The bill sets out the various levies made, and avers that they would be sufficient to satisfy the various executions under which they were made, and prays the deed of Banks may be cancelled.

The record of the suit of Andrew Armstrong, suing for the

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use of Prince and Garrett against the parties named in the bill, is filed but need not be further noticed. The deed from the marshal to Barry, and the one from Barry to Evans are also filed as exhibits. Banks's answer admitted the purchase by Barry and the sale to Evans, but denied that the levy by the sheriff was under the two executions only mentioned in the bill, but avers that it was made by virtue of several other executions, transcripts of which are filed as exhibits to the answer issuing on judgments, averred to be older than the executions under which complainant purchased. The answer avers that the purchase under the executions at sheriff's sale was *bona fide*, the defendant believing the only question to be, whether junior judgments by prior executions and sale, could divert the lien of prior judgments, which was then an open question. The defendant denies all knowledge of any payment of the execution in Sims's favor when he purchased, or any knowledge of Clark's execution, or any knowledge of the levies by the sheriff, under said execution of Sims, mentioned in the bill, and denies all connivance or fraud on his part in relation thereto, &c.

The executions referred to as exhibits to this answer, are those, 1. of Audley H. Gazzam against John H. Irby, Daniel W. Jordan and Lavender S. Wilkins, rendered April 9th, 1839; bond forfeited November 1, 1839, for $336.93. This execution is not further noticed for the reason given by the court. 2. Joseph B. Varnum against Daniel W. Jordan and Joseph W. Carroll, rendered April 9th, 1839, for $157.89; bond given and forfeited; on which an execution issued, and was levied on some stock and other personal property, which the sheriff returned not sold for want of time; a *venditioni exponas* issued, and was returned satisfied in full from sale of the property levied on; afterwards on the 4th of April, 1840, an *alias fi. fa.* issued, and was returned levied on the land in controversy, being two hundred and forty acres, which was sold to Banks, and the proceeds appropriated to other *fi. fas.*; "this one being satisfied under the sale on the *venditioni exponas.*" 3. Edward Sims against Daniel W. Jordan and Francis W. Irby; judgment on the 13th of April, 1839, for $970.50; bond

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forfeited, on which an execution issued, and was returned "*money not made;*" on the 27th of April, 1840; an *alias* issued, which was numbered No. 2086, which was returned levied on the land in controversy in this case, which was sold 15th June, 1840, to Banks at five dollars per acre, by which the execution was satisfied in full.

The complainant filed as proof the proceedings had in the case of Osborn D. Herndon et al. Trustees of Aberdeen against Daniel W. Jordan; judgment 13th April, 1839, for $404.20, and costs; execution issued 27th May, 1839, and levied on a negro; bond taken with Richard Evans as security, and forfeited, and execution had thereon, which was levied on certain negroes, who were sold for $1398.

Also the proceedings had in the same court in the case of Moses Westbrook against Daniel W. Jordan; judgment 9th April, 1839, for $93.60, and costs; execution issued 30th May, 1839, and levied on two mules; bond was taken, with Richard Evans as security, and forfeited; an execution had thereon 20th November, and returned satisfied in full.

Also the proceedings in Waldron, Thomas & Co. against Daniel W. Jordan; judgment 9th October, 1838, for $388.09 and costs; execution on a forfeited bond issued 4th December, 1839, and is returned as levied with other executions, on the same negroes returned as sold under the execution of Osborn D. Herndon et al. against Daniel W. Jordan. On the back of this *fi. fa.* is an acknowledgment by plaintiff's attorney of the reception of $411.25.

Also the proceedings in Tombigbee Railroad Company against Daniel W. Jordan, Richard Evans and John H. Irby; judgment 17th December, 1839, for $1053.78 and costs; execution issued 7th February, 1840, and levied on personal property (with other *fi. fas.*) too late to sell.

Everard Downing, jun., for complainant, states that Pryor M. Grant was sheriff of Lowndes county in 1840, and witness was his deputy; said sheriff kept a levy book to record the dates of levies; that executions were levied according to their priorities; in February, 1840, there was in the office of the sheriff an exe-

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cution in favor of Edward Sims against Daniel W. Jordan et al., and also other executions in favor of said Sims against F. H. Irby, J. H. Irby and D. W. Jordan; that by virtue of these executions, (and perhaps others against Jordan alone) witness in February, 1840, levied on about seventy bales of cotton, which he saw; and Jordan informed him of seventy-five other bales which were in a warehouse at Plymouth, to be included in the same levy, but which witness did not see; he thinks that said cotton was never sold, as he and Mr. Ottley generally acted as auctioneers to said sheriff.

Oats Carroway, for complainant, deposed that he knew the land in controversy between Evans and Banks; it was formerly owned by Daniel W. Jordan; Banks purchased it at sheriff's sale; a few days prior to the sale, Banks stated to this deponent that he (Banks) had consulted William Harris as to the title of the land, and had been informed by him that Evans's title was bad, and that a good title might be obtained by purchasing at the sheriff's sale, and if there arose any litigation about it, he (Harris) would attend to the business free of charge; and that Harris had shown to him a decision of chief justice Marshall, which was recognized as law; that Banks, a few days before the sale took place, declared that, although he was not known in the execution under which the land was sold, he was directly interested in it, and that a portion of the money was coming to him, and that he would have to pay but little money for the land; and on the morning of the day on which the sale took place, Banks again said he had consulted Harris, who informed him to buy if he wanted and he would get a good title; that Banks said the execution in which he was interested was that in favor of Edward Sims.

Abner Bell deposes in substance the same as Carroway, and adds that he at the time of sale was in possession of said land, and Banks asked him if he would give him possession if he bought the land; promising him if he would he might finish the crop, as he did not want to commence suit against Evans, but wanted Evans to begin suit.

Adolphus G. Weir deposed, that as marshal of the northern

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district, he sold the land in controversy as stated in the pleadings, and also some negroes, by virtue of the execution in Armstrong, use, &c. against John H. Irby et al.; that said executions were issued against Richard Evans, which was an error, as Evans did not sign the forthcoming bond; that the defendants had no other property on which a levy could be made; Evans did not procure the levy to be made on the land in controversy.

John H. Irby deposed that the negroes sold by the marshal were his negroes, and that they were purchased by Richard Evans for Prince and Garrett; these negroes were sold by Evans to different persons in and around Lowndes county; no means had been used to conceal them from observation.

Francis W. Irby states that he is a defendant in the judgment rendered in favor of Edward Sims against F. W. Irby, Daniel W. Jordan and John S. Chandler; and also in a judgment rendered in the same court in favor of said Sims against D. W. Jordan, F. W. Irby and J. S. Chandler. That in January or February, 1840, a levy was made on a portion of witness's cotton crop, which was sold soon after under the executions on said judgment; that between the levy and sale, William L. Harris and witness agreed that Harris should buy the cotton, ship and sell it, and credit the amount it would bring at Mobile on said executions; that Harris afterwards stated to witness, that he had drawn on Toomer, Gray & Co., Mobile, for $1000 in favor of Sims, to be applied to the execution in his favor against witness, D. W. Jordan and John S. Chandler; the amount levied on was seventy-six bales, and the proceeds thereon at Mobile $1995, at 6¼ cents per pound. That he was defendant in a judgment in the same court in favor of Martin T. Collier, the original judgment being for $3209.48 — the forthcoming bond being forfeited 4th March, 1839; $775 were paid to William L. Harris, attorney for plaintiff, in said judgment in August, 1839. That after April, 1840, the sheriff sold of witness's property to the amount of $1975, at the same time of John S. Chandler's, to the amount of $550 or $600; on the same day there was a sale of property of Jordan.

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Stephen B. Hoit states that he resided with D. W. Jordan, as overseer, in 1839, and till April, 1840. That Jordan produced, in 1839, one hundred and fifty-nine bales of cotton, averaging four hundred and fifty pounds each. That eight of Jordan's negroes were carried off by the sheriff to Columbus, perhaps in March or April, 1840. Some three or four were carried by Jordan to North Carolina; Jordan left Mississippi in April, 1840, during the term of court. His property was carried off Sunday night previous to the commencement of court. Jordan left privately, and carried, when he left, twenty-two negroes; the crop of 1839, was shipped by him to Mobile, Alabama. The three negroes which were levied on, but carried by Jordan to North Carolina, were worth $800 each.

Joseph P. Waddel states that he was deputy sheriff from November, 1839, to November, 1840; was clerk in the office, and kept the books; Grant was sheriff. He held, in the early part of 1840, an execution in favor of Edward Sims against Daniel W. Jordan, Francis W. Irby, and J. S. Chandler; and another execution in favor of Sims against said Jordan, Irby, and Chandler; and one in favor of Martin T. Collier against Francis W. and John H. Irby, and John S. Chandler and Thomas Wilson. The cotton of Francis W. Irby was sold March 2, 1840, to George R. Clayton. A written iustrument was given by Messrs. Harris and Clayton, on the 26th of March, 1840, addressed to sheriff Grant, in which Harris and Clayton say, that, so far as they are concerned, they have no objection to Irby's taking the negroes he now has, with him into Alabama, and selling them. Harris and Clayton were attorneys, in the cases mentioned, for the plaintiffs, and had control of the executions.

Thomas Christian states that he was a deputy sheriff, and that certain levies were made on the property of Jordan, Irby, and Chandler, for which he refers to the sheriff's levy book, and says he has no personal knowledge thereof.

William L. Harris states that he is counsel for the defendant in this cause; that he had a casual conversation with defendant a few days previous to defendant's purchase of the land in con-

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troversy; that the complainant's title to the land in dispute was alluded to as having been acquired under a judgment junior to outstanding judgments, a point which deponent was at the time examining in another case, and on which he had not yet formed his opinion. That at the October term, 1842, of the Lowndes circuit court, a motion was made by deponent to obtain leave for the sheriff, Grant, to amend his returns in the cases of Gazzam against Irby et al., Varnum against Jordan et al., and Sims against Jordan et al. Witness learned from Grant that the land in dispute had been levied on and sold under some or all of the executions in said cases; that the amendments were made on the day that leave was obtained, or on the morning following; that the returns were in a confused state, and Grant requested witness to make the motion. He drew up the answer in this case. Witness does not know that Banks's purchase was the consequence of consultation with any one. At the time of the purchase witness and George R. Clayton were partners, and had been for years; they were retained by Edward Sims some time after the commencement of the suit of Sims against Jordan et al. to assist Messrs. Bingham and Saunders in the management thereof. That Clayton and Harris had no control over the judgment in said case, as they were not the attorneys of record. Witness was Jordan's attorney in Clarke against Jordan. Did not know till long after Banks's purchase, that execution had issued in that case; he did not think it was properly in sheriff's hands at time of sale of said land. About the 26th of March, 1840, Francis W. Irby came to witness, and said he had some five negroes which he desired to take to Alabama, without being molested or maligned as to his motives. Witness understood that said negroes were not then levied on, and that they would be sold in Alabama, and the proceeds applied to some executions which witness had; and if not sold would be returned to this state. Witness addressed the note spoken of to Grant. Two of said negroes were subsequently brought back, levied on and sold by the sheriff. George R. Clayton bid off the cotton of Francis W. Irby. Previous to said sale, said Irby came to witness and Clayton, and expressed

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apprehensions that his cotton would be sacrificed, and desired it to be purchased and sent to Mobile, and he be allowed the benefit of this arrangement in payment of the executions over which witness and Clayton had control. The cotton was purchased and, with other cotton added by Irby, the whole raised at Mobile the net sum of $1997.97; $1000 was appropriated to Sims's claim, and the balance to Martin Collier's claim. Harris and Clayton were said Collier's attorneys. Witness could not tell from memory what sums were paid on Collier's claim. A note on A. J. Semmes, was transferred by F. W. Irby, to be applied in satisfaction of that claim, but the amount of said note not recollected. Witness has no recollection of any agreement between himself and F. W. Irby, except the one made in reference to the cotton. He knows nothing of any levies made in favor of Collier's claim, except such as appear on the executions. He knows of no payment made on the judgment of Sims against Irby et al., before the April term, 1840, of the Lowndes circuit court. There were three cases in favor of Edward Sims, viz.: against J. H. and F. W. Irby and Jordan, on bond forfeited 1st July, 1839, for $1936.16; against F. W. Irby, D. W. Jordan, and J. S. Chandler, on bond forfeited 1st July, 1839, for $970.58; against D. W. Jordan, F. W. Irby, and J. S. Chandler, on bond forfeited 1st July, 1839, for $970.58. He knows nothing of the payment of $823 on the execution in Collier against F. W. Irby et al., and he is under the impression that the "balance" returned on said execution as brought into court, had been applied for, though he did not know by whom. J. H. Irby was principal in Sims against J. H. Irby et al., and also in Tombigbee Railroad Company against D. W. Jordan et al. In answer to an interrogatory, as to how Banks accounted to the sheriff, P. M. Grant, for his bid on the land, witness says, that Harris and Clayton receipted to the sheriff, on the undertaking of Banks to pay Sims, who was his brother-in-law, when he arrived at Tuscaloosa, Ala., where both resided, that Banks paid nothing to the sheriff, but agreed to pay Sims; that Sims died not long after, and Banks became his executor. In answer to cross-interrogatories, he says he was not aware, nor was

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Banks aware, at the time of the purchase of said land by Banks, that it was pretended by any body that the judgments, under which the land was sold by the sheriff, were satisfied; he was assured, from his knowledge of the parties and his entire acquaintance with the business, that Banks had no interest in the suits on which Sims obtained judgment.

Sterling Lester states, that in 1842, prior to October term, 1842, of Lowndes county circuit court, Pryor M. Grant, sheriff, came to the office of the clerk of said court and altered his return on the execution in Sims against Jordan et al., which was returnable to April term, 1840. The erased return purported, simply, said execution to have been satisfied in full, 5th October, 1840. The substituted return purported said execution to have been levied on the land, the title to which is litigated by these parties, and the same to have been sold to Banks, and also on a negro woman. Grant stated to defendant, that he had made his return more full and explicit. Defendant says, he refused to permit said Grant to amend any more returns without an order of court, and that in October term, 1840, of said court, Grant obtained leave of court to amend his returns in Gazzam against J. H. Irby et al., Varnum against Jordan et al., and Sims against Jordan et al. It is not deemed requisite to notice the exceptions filed to these depositions.

There was submitted to the vice-chancellor, as evidence, a bill filed by John Chandler, in the superior court of chancery, against Edward Sims and others; it states, that Sims had obtained several judgments in Lowndes circuit court, against D. W. Jordan, J. H. Irby and F. W. Irby, that complainant was security on the forthcoming bonds given by the defendants, which bonds were forfeited, and thereupon a negro of complainant was levied on and sold. The bill prays that the proceeds be not applied to the executions on those bonds, but be paid to complainant. Because the sheriff had levied on negroes of D. W. Jordan, one of the defendants, sufficient in value to pay all the executions on which complainant was liable; but by directions of Sims's attorneys, the executions were returned unsatisfied, and Jordan permitted to abscond with his negroes from

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the state. The bill for this states, that F. W. Irby, another of the defendants, had slaves more than enough to satisfy said executions; but by permission of Sims's attorneys, said Irby was allowed to transport his slaves out of the state, by reason of which the executions against said Irby were returned unsatisfied. An injunction was granted, enjoining the sheriff from levying on complainant's property, and from paying the proceeds of the sale of said negro, in the bill mentioned, to the satisfaction of said executions. The subpœna was never served on Sims.

There were filed, also, the proceedings had in the case of Martin T. Collier, John H. Irby et al., and John S. Chandler against Francis W. Irby; judgment 9th October, 1838, for $3,081.44 damages and costs; execution issued 11th December, 1838; levied on nine negroes, bond taken with Thomas Wilson as security, and forfeited; execution had thereon 16th May, 1839; levied on eleven negroes as the property of F. W. Irby; proceedings stayed by an injunction and supersedeas, on the 20th August, 1839; on 15th February, 1840, an alias issued and was returned, "not made," and appended to said return is the note referred to in the deposition of Harris Waddel. Indorsed on said *fi. fa.* is a receipt by Clayton and Harris for $775, August 26, 1839; a *pluries* issued 24th April, 1840; levied on property which was sold to the amount of $1,994.41; paid $823 to plaintiff, balance brought into court. Other indorsements show a payment 20th May, 1840, $997.97; June 30, 1840, $829; 1st October, 1840, $126; proceeds of A. J. Semmes's note. An execution issued 26th June, 1841, to the sheriff of Choctaw county, who levied on land and made $256.00. Also in the case of Edward Sims against John H. Irby and Francis W. Irby, which is numbered 2084; judgment 13th April, 1839, for $1,936.16 damages and costs; execution issued May 24th, 1839; bond taken with J. S. Chandler, as security, forfeited; execution issued thereon, 1st November, 1839, and indorsed "Returned by order of plaintiff's attorney, April 13th, 1840, P. M. Grant." On 8th June, 1840, *fi. fa.* issued and levied, with other *fi. fas.* on property, to the amount of $1,994.21. Also in the case of

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Edward Sims against Francis W. Irby and Daniel W. Jordan, numbered 2085; judgment 13th April, 1839, for $970.58, and costs; execution issued 24th May, 1839; bond taken with J. S. Chandler as security, forfeited and execution had thereon, 1st November, 1839; returned "money not made, 1st April, 1840." An alias issued 27th April, 1840; returned "levied, with other *fi. fas.* on property to the amount of $1,994.21, and on other property." Indorsed on this *fi. fa.* is a receipt by Harris and Clayton for $1000.

On the 8th of November, 1844, a decree was rendered by the vice-chancellor upon the pleadings and proof, declaring Banks's title to be null, by reason of the satisfaction and extinguishment of the judgments under which he had purchased; and Banks appealed.

W. Yerger, for appellant, contended,

1. That it was clear, from the evidence, that the judgments under which Banks claimed had not been satisfied when the sale to him took place. Mr. Yerger reviewed and commented on the testimony on this point at length.

2. That the levy on the cotton which was left with the defendant was not a satisfaction in law of the judgment; the rule that a levy was a satisfaction, was for the benefit of defendant to prevent excessive levies; and if property levied on was returned into his possession, or died or escaped, the defendant was liable to a new levy. He cited *Morrow* v. *Hart's Administrator*, 1 Marsh. 292; *Burford* v. *Alston*, 4 Dev. R. 351; *In the matter of King*, 2 Dev. 341; 4 Dallas, 358; 1 Salk. 322; 2 Modern R. 214; *Walker* v. *McDowell*, 4 S. & M. 135; 2 S. & M. 428.

3. The seventy-five bales of cotton, not seen by the deputy, said to be in the warehouse, never was levied on in contemplation of law. 3 Wend. R. 446; 14 Wend. R. 123; 16 Johns. R. 288. It was proved by Hart to have been shipped and sold by Jordan himself.

4. That the negroes spoken of as having been sold by the witnesses Irby, were sold under the judgments of Herndon et al., Waldron, Thomas & Co., &c., and not under the Sims judgment.

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5. It is objected to the title of Banks, that the money made by the sales of the other judgments should have been applied to the judgment of Sims; a sufficient answer to protect the title of Banks would be, it was not so applied; but

6. It ought not to have been so applied; money arising from the sales of property should be applied to the *fi. fas.* under which it was sold. 6 How. (Mi.) R. 536.

7. The statements of the witnesses made from the levy books, of levies, &c., was illegal, and ought to have been excluded; they were mere unofficial private memoranda, and not required by law, and copies of them would not be evidence. 1 Phil. Ev. 410; Ib. 458; Ib. 220, 221; 8 East, 279; 1 Phil. Ev. Cow. & Hill's notes, n. 425; 2 Ib. 674, n. 489; 2 Ib. 1088, n. 741, 742. The witness did not himself make the memorandum. 2 Phil. Cow. & Hill's notes, 1278, n. 870.

8. The allowance by Harris & Clayton to Irby to remove a portion of his negroes, does not affect the lien of Sims's judgment; Jordan's property was also bound; a man having two securities may release one of them. *Woods* v. *Terry.*

9. Irby was but an indorser. Jordan's property was first liable, and the removal therefore of Irby's slaves could not affect Sims's lien on Jordan's property. How. & Hutch. 596, §§ 38, 42.

10. Even if the judgments under which Banks purchased were paid, he was ignorant of it, a *bona fide* purchaser without notice, and will be protected. 1 Cowen, 622.

11. Notice is attempted to be established by the bill filed by Chandler, which is set up as a *lis pendens; lis pendens* is only notice from the day of service of *subpœna;* here there was no service. 1 Wend. 478; 7 Mon. 116; 15 John. 315; 2 Mason C. C. Rep. 531; 1 John. Ch. R. 576; 2 Sug. Vend. 324.

12. *Lis pendens* is only notice to purchasers from the defendant in the suit of the property named in the suit. 3 Atk. 397; 4 Cow. 667; 1 McCord's Ch. R. 264; Sug. Vend. 327.

Evans, for appellee, contended,

1. That though the oldest judgment, levied last, prevailed over

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a junior judgment with a prior levy, as decided in *Andrews* v. *Wilkes*, 6 How. 554, yet the lien of the older judgment might be lost or postponed to the younger by the act of the party. *Michie* v. *Planters Bank*, 4 How. (Mi.) 130; *Robinson* v. *Green*, 6 Ibid. 228; *Russell* v. *Gibbs*, 5 Cow. 390. All the judgments under which Banks claims, are obnoxious to the principles adjudged in these cases to postpone the liens of oldet to junior judgments.

2. Banks claims under the judgments in favor of Gazzam, Varnum, Clark and Sims; the execution on the Gazzam judgment issued on the 20th of June, 1840, five days after the land was sold; it could not, therefore, have been sold under that.

3. The Varnum execution was extinguished by the sale of the 18th of May, 1840, of the personal property, and of the levy thereon, to the April term, 1840. The levy was a satisfaction independent of the sale. 12 John. Rep. 207; 4 Mass. 203; *Head* v. *Beattie*, 5 How. (Mi.) R. 483; Ibid. 629; 4 S. & M. 118.

4. The bill alleges that the Clark execution was satisfied to April term, 1840; Banks has not set it out in his answer, but Harris, his attorney, admits it was not properly in the sheriff's hands at the time of sale, and thus abandons all claim under it. Thus the only execution under which Banks claims title to the property, is the Sims judgment.

5. The sale of land under such a "batch of executions" as that under which Banks claims, is in itself a fraud, and should be declared null: it was perverting the object of execution sale, and thus rendering it illegal. *McDonald* v. *Neilson*, 2 Cow. 183; *Carlisle* v. *Carlisle*, 7 J. J. Mar. 624; *Woods* v. *Monell*, 1 John. Ch. R. 505.

6. The Sims judgment had lost its lien by indulgence. Mr. Evans reviewed the testimony on this point, and commented at length on the sheriff's return, "*money not made*," which he insisted was adopted by Sims, because he failed to prosecute the sheriff for *his* laches, and cited How. & Hutch. 625; Ibid. 298, § 29.

7. Its lien was lost by gross negligence and fraud actually

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committed in the sham sale of the seventy-six bales of cotton; in the permission by the attorney of Sims to remove the slaves of Irby from the state; in the failure by the sheriff to sell slaves levied on.

8. It had also lost its lien by reason of levies on personal property to an amount sufficient to pay it. The records of the judgments and executions were reviewed, and the following authorities cited to establish this point: 4 Cowen, 417; 7 Ibid. 13; 4 Mass. 403; 7 John. 428; 6 Wend. 526; 5 How. 483, 629. Evans, when he bought, knew the debts were thus extinguished. Admit that Banks did *not* know it, shall his ignorance prevail over Evans's knowledge? Which in equity occupies the best ground? See *Jackson* v. *Caldwell*, 1 Cow. 640.

9. The doctrine that a sale under a paid judgment to a *bona fide* purchaser, passes a title which cannot be questioned by the defendant, is not well settled. See 3 How. 68; *Saunders* v. *Caldwell*, 1 Cow. 622.

10. The judgment of Sims was paid before the sale of the land to Banks. On this point, Mr. Evans referred to the various judgments, executions, sales, credits and returns, and insisted, in an elaborate review and calculation, that they showed the satisfaction of the judgment previous to the April term, 1840, as well as subsequent thereto, and both prior to the sale of the land to Banks.

11. Banks is not a *bona fide* purchaser; he bought with full notice of Evans's title, and is thus guilty of constructive fraud, and his own title will be postponed. 1 Sto. Eq. 383, § 395; Ibid. 388; Newl. on Contracts, 511; *Taylor* v. *Baker*, 5 Price, 306; *Allen* v. *Anthony*, 1 Meriv. 282.

12. Harris, the attorney of Sims, had noticed, and advised and consulted with Banks, with reference to his purchase; and thus Banks, through him, had notice. 1 Sto. Eq. 395, § 408; Sug. Vend. Ch. 17; *Toulmin* v. *Steere*, 3 Meriv. 209; *Brotherton* v. *Hatt*, 2 Ver. 574; 2 Pow. on Mort. 585, 583, 584, n. *e*.

13. The bill of injunction of Chandler, was notice to Banks; that bill enjoined the Sims judgment, and thus Banks had notice of it. It was a *lis pendens*.

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14. Banks had notice, because he was interested in the Sims judgment; he was a secret plaintiff; he said he was interested in the judgment; he paid nothing for the land.

15. To make a *bona fide* purchaser, without notice, he must deny notice before the money is paid. Here no money is paid yet. *Story* v. *Lord Windsor*, 2 Atk. 630; 1 Ch. Cases, 34; *Wigg* v. *Wigg*, 1 Atk. 382.

Baine, on same side, contended,

1. That the judgments under which Banks bought were paid, and collated and compared the testimony to prove it.

2. That the record showed levies on a large amount of personal property not disposed of and not accounted for; and he insisted that the judgments were thereby satisfied; and that the judgment being satisfied, the lien of the judgment was thereby removed; and if the satisfaction should afterwards prove not to be real, the lien should only revive from the time the judgment obtained its original vigor. The satisfaction of a judgment should always extinguish the lien of it.

3. Sims's judgment was older than some of the others; the money arising from the sales ought to have been appropriated to his judgment; if the sheriff chose to misapply it, and Sims acquiesced in the misapplication by failing to pursue the sheriff, the consequences must fall on Sims; his laches in pursuing his rights cannot in justice affect Evans's claim.

4. The return of the slaves levied on to the defendant was a fraud on the rights of Evans. That the attorney had power to release the levy, see *Jackson* v. *Anderson*, 4 Wend. R. 474.

5. The levy of the execution on the land sold to Banks was absolutely void; the sheriff had no execution in his hands when it was made; he did not go on the lands or in view of them. It was a fictitious levy, and no title passed. *Lehr* v. *Rogers*, 3 S. & M. 468.

6. Banks was interested in the execution under which he purchased. This was notice. *Jackson* v. *Caldwell*, 1 Cowen, 622, 640.

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Potter, on same side.

1. The alleged judgment of Clarke against Jordan, will not sustain the title of Banks. There was a mere order against Jordan to pay costs of an *habeas corpus* proceeding, and this was not a lien. The costs were paid before the sale, and there was at that date no such execution in the hands of the sheriff. Such is alleged in the bill, and tacitly admitted in the answer. Under the allegations, Banks was bound to produce the record, and show its sufficiency.

2. The Varnum judgment was satisfied before the sale of the land to Banks.

3. The judgment of Sims against Jordan, F. W. Irby and Chandler, does not support the title of Banks. The erased entry of "satisfied," is the true entry upon the execution, and there is no proof of a levy or sale of the land under this judgment. The first entry of a sale of the land was made by a deputy after the sale, and it was erased by the sheriff before return of the writ. The second entry of a sale of the land was made after return of the writ, without authority, without notice to Evans, and was null. *Emerson* v. *Upton*, 9 Pick. 167; 13 Ohio, 221; *Mann* v. *Nichols*, 1 S. & M. 257.

4. The judgment of Gazzam cannot avail Banks, for the execution was issued after the land was sold, and after the execution of his deed by the sheriff.

5. The several judgments were *paid* before the sale of the land, and the subsequent sale was void, especially as Banks is not a *bona fide* purchaser. He has paid nothing, and was interested in the Sims judgment. *Hammatt* v. *Wyman*, 9 Mass. 142; 15 Johns. 446; *Wood* v. *Colvin*, 2 Hill (N. Y.) 566; *Deyo* v. *Van Valkenburg*, 5 Hill, 246; *Cameron* v. *Irwin*, Ib. 272; *King* v. *Goodwin*, 16 Mass. 63; *Freeman* v. *Ruston*, 4 Dall. 214.

6. It is no answer to say that the proceeds of sales were not applied to these judgments; for the creditor must look to that and the judgment is satisfied, even though there be a misapplication by the sheriff. *Finney* v. *Commonwealth*, 1 Pa. 240; *Planters Bank* v. *Spencer*, 3 S. & M. 313; 1 Rawle, 33.

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7. Nor is it any answer to say these executions were not levied, for they were in the hands of the sheriff at the date of the levies, and in such case a levy under one execution is a levy upon *all*. *Van Winkle* v. *Udall*, 1 Hill, (N. Y.) 560; *Collins* v. *Yemens*, 37 Eng. Com. Law, 175; *Cresson* v. *Stout*, 17 Johns. 116. Under this rule, the property sold prior to April term, 1840, was levied on under *all* the executions, for they were in the hands of the sheriff at the date of the levy.

8. Banks is not a *bona fide* purchaser; he knew Evans had a claim, and was bound to inquire into the proceedings under the executions. *Jackson* v. *Caldwell*, 1 Cow. 622. He was part owner of the Sims judgments, and so was affected with notice.

9. The judgments were satisfied by the levies. A levy undisposed of is satisfaction, and the second execution cannot issue. *McGehee* v. *Handley*, 5 How. 629. "Whilst the levy continues the plaintiff's recourse against the defendant is at an end." Such levy is satisfaction; a payment which may be set off as such. *Kershaw* v. *Merchants Bank*, 7 How. 393. "After a sufficient levy the plaintiff cannot have a new execution, but must pursue the first levy until it is disposed of." *Pickens* v. *Marlow*, 2 S. & M. 434. If there are two executions for the same debt, a levy and sale under one extinguishes the other. *Planters Bank* v. *Spencer*, 3 S. & M. 313. A levy is satisfaction until shown to be disposed of. 4 S. & M. 134; *Case* v. *Adams*, 3 How. 223. By second levy, the first not being disposed of, the sheriff is a trespasser. *Hoyt* v. *Hudson*, 12 Johns. 207. Whilst the levy is undisposed of, a second writ is void. *Arnold* v. *Fuller*, 1 Ham. 458.

10. I admit that when the property is restored to the defendant, he cannot insist that the judgment was satisfied by the levy, but he may insist upon the levy, whilst it continues, as an entire satisfaction. As to third parties, a levy is satisfaction. *Duncan* v. *Harris*, 17 S. & R. 436; *Ex parte Lawrence*, 4 Cow. 417; *Hunt* v. *Breading*, 12 S. & R. 37; *Ford* v. *Geauga County*, 7 Ohio, 482; *Wood* v. *Torrey*, 6 Wend. 562; *Jackson* v. *Benedict*, 13 Johns. 534.

11. If the prior payments or levies did not render the subse-

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quent executions void, and the sale of Banks null, still the liens of the judgments were destroyed by such payment and levy, and Evans thus purchased under the oldest lien. Payment raises the lien. *Jackson* v. *Caldwell*, 1 Cow. 640. Upon levy made, the lien ceases. *Ex parte Lawrence*, 4 Cow. 418; *Jackson* v. *Bowen*, 7 Cow. 21.

12. The entries on levy book were evidence of levies; the sheriff was required by law so to note his levies. H. & H. 655, § 82.

This cause was argued and submitted at the January term, 1847, when Mr. Justice CLAYTON delivered the opinion of the court.

This is a bill filed in the vice-chancery court, by Evans, to have a deed cancelled, which is alleged to constitute a cloud upon his title. The complainant purchased the land under an execution from the district court of the United States, at Pontotoc; Banks purchased the same land under executions from the circuit court of Lowndes county, against the same party. The judgments under which Banks purchased are older than that under which Evans purchased; but it is alleged that the preference and priority of the former have been lost from various causes.

There is an elaborate argument on the part of the complainant in support of this position; which renders it necessary to examine the facts with some degree of minuteness.

The sheriff's deed to Banks recites that the sale was made by virtue of sundry executions, issued at the suit of Edward Sims, Benjamin Clark and others, against Daniel W. Jordan et al. The answer of Banks states that the sheriff's sale was made under four executions, against Jordan, one in favor of A. H. Gazzam, one of Joseph B. Varnum, one of Benjamin Clark, and the other of Edward Sims. The argument endeavors to point out some defect, or negligence, or misconduct, or act in regard to each of these executions, which would vitiate the sale.

It is certainly incumbent on the complainant to establish the

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facts which would annul the purchase of the defendant. Unless there be something to take the case out of the operation of the general rule, the title of the defendant must prevail. This is conceded by the complainant.

The defendant was mistaken in the statement, that the land was sold under the Gazzam execution. The record shows that the sale was made on the 15th of June, 1840; and that execution did not issue until five days afterwards. It may, therefore, be rejected, as lending no support to the case.

The execution of Varnum was levied upon personal property, in November, 1839. A *venditioni exponas* was issued in April, 1840, which was returned "satisfied in full from sale of property levied on." An alias *fi. fa.* issued at the same time, which purports to have been levied upon the land, and a sale made under it; but the return shows it was satisfied by the sale of the personal property under the *venditioni exponas*, and reference is made to the *venditioni* in support of that fact. Whether this *fi. fa.* was void, or only voidable, and whether the sale under it can be sustained, need not be decided. We shall make some farther remarks upon this point, before we conclude.

The bill states that there was no execution in favor of Clark in the hands of the sheriff. That it had been paid before April, 1840, and was never issued afterwards. The deed recites that this was one of the executions under which the land was sold, and the answer states the belief of the defendant, that it was in the hands of the sheriff at the time of the sale. This execution is not contained in the record.

It devolves upon the complainant to make out his case. In reference to this execution, there is no evidence in support of the allegations of the bill, nothing which contradicts the recital in the deed. His case at this point, seems not to be made out; but we shall proceed to the consideration of the execution of Sims, because the great struggle in the argument is made upon that.

The first execution issued upon the forfeited forthcoming bond in the Sims case, was returned April 1st, 1840, with the indorsement, "money not made." Another *fi. fa.* issued 27th

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April, 1840, which was returned on 5th October, 1840, "Levied on certain land (the same here in dispute), sold to Willis Banks at five dollars the acre, 15th June, 1840; and this execution satisfied in full." There is nothing in either of these returns, which is sufficient to postpone the lien of the judgment. No indulgence was given by the plaintiff, although the sheriff failed at one term to perform his duty. That rendered the sheriff liable, but did not affect the judgment lien. There does not appear to have been any negligence on the part of the plaintiff, nor any interference by him with the due course of the law. There is nothing, therefore, in the returns upon this execution, which will vitiate the sale under it.

A great deal of testimony has been taken to show that there was sufficient personal property levied on to satisfy this execution; that part of it was left in the hands of the defendant, and was never sold under it, and that other personal property was released by the attorneys of the plaintiff. It is also attempted to be proven, that this execution was actually paid off and discharged before the sale of the land.

The deposition of Donsing proves that, as deputy sheriff of Lowndes county, in January or February, 1840, he levied under this and other executions, upon a quantity of cotton at Jordan's gin, supposed to be about seventy-five bales, and upon seventy-five bales more, which he was told by Jordan was in a warehouse at Plymouth, but which he never saw. He did not take possession of either lot, and it was never sold by the sheriff. Another witness proves that the cotton was shipped by Jordan to Mobile. We do not think this amounted to a valid levy; but if it did, still, it did not constitute a satisfaction of the execution. On that subject the rule is thus laid down, by a court of great respectability: "The seizure of personal property under a *fi. fa.* is constructively a discharge of the debt. But if the defendant were never deprived of his property by the sheriff, or if he were, and got it back, either with or without the consent of the sheriff, it would be monstrous to say the defendant had paid his debt. The levy on property is not actual payment, which the law always aims at. It is only

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constructively so, to prevent wrong. It is deemed a payment, in those cases, where if it were not, the defendant would be twice deprived of his property on the same judgment. In all other instances it is no payment." *Ex parte King*, 2 Dev. 341. See *Clerk* v. *Withers*, 1 Salk. 322; *Taylor* v. *Baker*, 2 Mod. 214; *Binford* v. *Alston*, 4 Dev. 351; 4 S. & M. 135.

In regard to the release of the other property by the attorneys, the testimony shows, that the written order to that effect, was construed by the sheriff to apply to the execution of Collier against the same defendants; and that in point of fact the slaves released, had never been levied on by this execution. This is a sufficient answer, but if the property had been seized under this execution, still we believe, that the general authority of an attorney at law as such, does not extend so far as to release property levied on. See *Jackson* v. *Bartlett*, 8 Johns. 361; *Gorham* v. *Gale*, 7 Cowen, 739; *Clark* v. *Kingsland*, 1 S. & M. 256. If there were any special authority in this case, it has not been shown.

As to the remaining question, the effect of payment of a judgment before a sale is had under it, there is a want of harmony in the authorities upon the point. *Luddington* v. *Peck*, 2 Conn. and *Dor* v. *Snyder*, 3 How. regard a sale in such case as valid; whilst *Sherman* v. *Boyer*, 15 Johns., *Hammett* v. *Wyman*, 9 Mass., *King* v. *Goodwin*, 16 Mass., and *Wood* v. *Colvin*, 2 Hill, hold the contrary.

But whatever may be the rule as to the validity of the sale, a point which need not be determined, it is clear and certain, that the lien of the judgment is discharged by the payment of the judgment. *Jackson* v. *Cadwell*, 1 Cowen, 640. A sale under an execution after payment of the judgment, cannot relate farther back, than the time when the execution went into the hands of the sheriff. H. & H. 630. We do not mean to decide, that it can have that effect; nor that the sale is valid at all, but conceding, for the sake of argument, that it is valid, it can certainly extend no farther, than the lien of the execution. These remarks apply equally to the Varnum execution.

Then the lien of the judgment, under which Evans pur-

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chased, would overreach the sheriff's sale under these executions, if in truth, the Sims judgment had been previously paid. That point of fact, we will proceed to consider. The testimony is not so clear as it might probably have been made in the court below; but it is our duty to determine it upon such proof as the parties have presented to us.

There were various judgments in the circuit court of Lowndes county, against these same defendants; and several executions were often in the hands of the sheriff at the same time. There were three judgments of Sims, one of the Tombigbee Bank, and one of Martin Collier, which claim our attention. The aggregate amount of these, with interest and costs, is about $9,000. The complainant has made a calculation to show that all the executions against the defendants had been paid, at the time the land was sold. He intimates the amount of the executions at $5,150, and the amount of cash, which had then been paid, at $8,953.

There are, as we think, several errors in his computation. In the first place, the execution of the Tombigbee Bank, and one of Sims, are omitted. Harris, in his deposition says, there were three judgments of Sims, to one of which a credit of $1000, proceeds of sale of cotton, was to be applied. The complainant has omitted the largest of the three executions, and applied this credit of $1000 to the other two. He has omitted the execution of the Tombigbee Bank, and has applied as a credit to the other executions of Sims and Collier, the sum of $1036.82, which was made upon this execution of the Tombigbee Bank, and applied by the sheriff as a credit to it. He appears to have credited $997, proceeds of sale of cotton, twice; once in a separate item, and once in the aggregate of $1997. So also, he appears to have put down as credits the amount of sales of property made by the sheriff, and then the receipts of the attorneys to the sheriff for the money. Again he has included payments made *after* the sale of the land, to prove that the judgments were paid *before* the sale. Of this character is the amount made upon the Collier execution in Choctaw county, in 1841, and a voluntary payment made in

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October, 1840. When these errors are corrected, it is very manifest to us, that the judgment of Sims, was not paid at the time of the sale of the land.

We do not perceive that any fraud has been practised by the defendant, or those under whom he claims.

This view makes it unnecessary to consider of the other points, made in the argument.

As the case depends very much on a complicated state of facts, and as the record is not so perspicuous as we could desire, we shall not preclude the complainant from another investigation in a different forum, if he should desire to try the matter in an action of ejectment. We therefore reverse the decree and dismiss the bill, without prejudice to the rights of complainant at law.

Decree reversed.

Upon the delivery of this opinion, a re-argument was applied for, on the part of Evans, and was granted; the re-argument was had at the present term, (January 1848.)

Mr. Justice CLAYTON delivered the following opinion, on re-argument.

We have given to this case, since the re-argument, the consideration which its importance demands, but it has led to no change in the result. A few farther remarks may be deemed necessary.

In regard to the execution of Sims against Jordan, et al., under which the land was sold, objections are urged to it, because the return was erased and altered. We do not understand the facts as counsel do; — the return, if satisfied, which is erased, may well comport with the idea, that the satisfaction arose from the sale of the land in controversy, as set forth in the return as it now stands. The deed to the purchaser bears the date of the day of sale; the title it conveys cannot be affected by the return of the sheriff, made subsequent to the deed. *Doe* v. *Heath*, 7 Blackf. 156.

There is nothing in the record to show, that Banks does not

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occupy the place of a purchaser. There is no evidence that satisfies us he was interested in the execution. When he bought, the attorney placed a credit on the execution for his bid, with the understanding that Banks was to pay the plaintiff, as they both lived in the same neighborhood, in Alabama. The plaintiff, who alone had right to complain of this arrangement, has never done so.

We do not think the execution in question was *paid* before the sale took place under it. The statement and calculations of counsel, have undergone re-examination, and, to our minds, there are manifest errors. For example, the execution of the Tombigbee Bank is thrown out, and the money applied to its payment by the sheriff, is in the statement transferred as a credit to the other executions, because it was younger in date than the judgment under which Evans sets up title. Sims is not responsible for a misapplication of the money by the sheriff, if there were such, when the money was not made under his execution. For any thing that appears, he knew nothing of it, and was in no manner privy to it. The sale under a younger judgment did not divest the lien of his judgment, even as to the property sold; far less could it have that effect as to that which was not levied on. Another example of error in the statement is, that one execution of Sims is omitted; one, too, upon which money had been paid, now claimed as a credit to this. When these corrections are made, it is certain that this judgment had not been paid before the sale.

In the case of the *Planters Bank* v. *Spencer*, 3 S. & M. 313, cited in argument, to show that the judgment is satisfied, even where there is a misapplication of money by the sheriff, all the executions out of which the controversy arose, had been levied on the property, and the sale took place under all. The court held, the sheriff was bound to appropriate, according to the date of the respective judgments. But the case has no application to executions not actually levied. We do not give our assent to the doctrine insisted on, that when a sheriff has several executions in his hands, a levy of one is a levy of all. In reference to a *ca. sa.*, that is no doubt the rule, and that was

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the kind of execution in *Collins* v. *Yemens*, 37 E. Com. Law Rep. 175. But we cannot see the just application of such rule, to writs of *fi. fa.*, although so held in New York, in *Van Winkle* v. *Udall*, 1 Hill, 560. When the body is under arrest, the practice is simply to charge the debtor in execution, not to make a second arrest. But when there are several writs of *fi. fa.* in the hands of the sheriff, he may levy some on personal and some on real estate; or he may levy part on personalty, and not levy the others; and if sufficient money be not made, to satisfy all, the others may be afterwards levied on realty. The case cited, of *Pickens* v. *Marlow*, 2 S. & M. 434, relates to an actual levy of the execution. Nothing herein contained interferes with that case. It is there held, that a levy is only *prima facie* satisfaction, and does not destroy the judgment lien. The same is true of the cases of *McGee* v. *Handley*, 5 How. 625, and *Kershaw* v. *Merchants Bank*, 7 How. 386. The execution in this case was never in fact levied on personal property.

The rule is the same in reference to third persons, as between the parties themselves. *Ford* v. *Geauga County*, 7 Ohio Rep. 482.

He who comes into equity to get rid of a legal title, which is alleged to overshadow his own, must show clearly the validity of his own title, and the invalidity of his opponent's. He cannot expect a court of equity to set aside a legal title, upon a doubtful state of case.

We cannot do more than reiterate our former decision, that the bill be dismissed, without prejudice to the legal rights of the complainant.

Decree reversed.

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William V. Taylor *vs.* James M. Strong et al.

Where a bill in chancery was filed by A. & B. & C. to rescind a sale of land made by A. & B. to H. & T., and the bill averred that A. & B. held the land in fee for the use and benefit of C., and one of the defendants to the bill called for proof of its allegations, and H., whose evidence was taken, in answer to the question whether he and T. had not bought the land of A. & B., *trustees* of C., replied that he had; it was *held* sufficient proof of C.'s interest.

A. & B. conveyed a tract of land to T. in fee simple; A. & B. held the title to the land for the use of C., and the deed was made to T. for the benefit of H., but neither of these trusts appeared in the deeds; at the time A. & B. sold to T., one K. had a judgment against both H. & T.; there were other judgments against H., but not against T. After A. & B. conveyed to T., the latter with H. executed to them an obligation reciting the sale, and the fact that the land thus sold had been levied on under the execution against H., and promising to pay A. & B. five thousand dollars if they did not return the land free of incumbrance to them; it was agreed between C. & H. that one G. was to sign this obligation, but he did not do so; the land being about to be sold under the execution of K., A., B. & C. filed their bill for an injunction, and a cancelment of the deed of A. & B. to T.; it was averred in the answer of T., and proved by the deputy sheriff, that the object of the sale by A. & B. to T., was to subject the land conveyed to the execution of K., and thus procure time by the valuation law being taken; H. however testified that the title had been made to T., because H. had other judgments against him, under which a levy might be made on the land. *Held*, that it was not sufficiently proved that the object of the sale by A. & B. to T., was to delay K. in his effort to collect his debt, and that the deed to T. should be annulled; the title revested in A. & B., and K. perpetually enjoined from levying on the land.

Nor would the fact when the execution of K. was levied on the land as the property of T., and it was advertised for sale accordingly, that C., on being informed of the proposed sale expressed his willingness thereto, affect C.'s right to relief against the execution of K.; it would be otherwise if a sale with C.'s tacit or express acquiescence had actually taken place, and K. had paid money or involved his credit in the purchase.

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Taylor v. Strong et al.

Where, after the rendition of a judgment against T. & H. in favor of K., T. obtained a deed in fee simple to a piece of land from A. & B., with the understanding at the time that one G. should join T. & H. in the obligation to A. & B. for the purchase-money, which G. never did; and the execution of K. was levied on this land; it was *held*, that the sale to T. having been made on a condition never fulfilled, should be annulled, and the title revested in A. & B., and that it was not a proper decree to order a sale of the land to enforce the vendor's lien.

How far the vendor's equitable lien will prevail against a judgment creditor of the vendee, whose judgment was older than the sale from the vendor to the vendee, — *Quære.*

On appeal from the district chancery court, at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

On the 6th of September, 1841, James M. Strong, James Mooring and Weldon Jones filed their bill against Thomas Hunt, William V. Taylor and James A. Knox, in which they allege that Mooring and Jones were possessed and clothed with the legal title to section one, township two and range two west, in Marshall county, and which they held in fee to and for the use of Strong; that an agreement was entered into between Strong and Hunt and Taylor, that Mooring and Jones should convey this land to Taylor; and that Hunt and Taylor should execute their obligation to Mooring and Jones, for the payment of the sum of five thousand dollars, in the event that they did not return said section of land or execute such an indemnifying bond, as would enable Mooring and Jones to sell said land and make good title thereto; and that John Glasgow, then of Tennessee, now dead, should join Hunt and Taylor in the obligation. The security of Glasgow's name, he being a man of wealth, was the principal inducement to the agreement, as both Hunt and Taylor were then, and now, and had been all the intermediate time hopelessly insolvent.

That at the instance of Hunt and Taylor, Mooring and Jones made a deed to Taylor to the land, and Hunt and Taylor executed the obligation agreed on, except as to the signature of Glasgow; that the complainants never received or acted under this agreement because Glasgow had not signed it. The deed had been executed on the faith of the positive assurances of Hunt and

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Taylor that Glasgow would do so, but he died without doing it, leaving the obligation therefore inoperative. Hunt and Taylor paid nothing for the land, which was worth five thousand dollars.

That James A. Knox obtained judgment in March, 1839, for $3524.10 against Hunt and Taylor; a forthcoming bond on which, was forfeited, Sept 2, 1839, and a *fieri facias* on the bond had been levied on the land.

That Taylor had sufficient negro property to pay this execution, but not enough to pay all his debts.

That this judgment in favor of Knox was not a lien on the land superior to the equitable lien of complainants for the purchase-money; but that Knox, having only a creditor's interest, or any purchaser under Knox's judgment would hold the land, chargeable with all equities that the complainants would have against Hunt and Taylor, or either of them; that a sale of the land would throw a cloud about their right to relief and upon their title; they therefore pray for an injunction, that it may be made perpetual; the deed to Taylor be declared void, or Taylor be compelled to reconvey the same to complainants, or for other relief.

The deed from Mooring and Jones was dated 6th day of May, 1840, was acknowledged on the same day, and filed for record on the 12th of May, 1840.

The obligation given by Hunt and Taylor was in these words, viz.:

"Whereas, James Mooring and Weldon Jones have conveyed to William V. Taylor a tract of land, (here follows the description) for the benefit of Dr. Thomas Hunt, and which land has been levied on by the sheriff of Marshall county, to satisfy a debt due by said Hunt; now we, the undersigned, in consideration of said conveyance, oblige ourselves to pay to said Mooring and Jones the sum of five thousand dollars, in the event of our not returning said land, or executing such an indemnifying bond as shall enable them to make a good title to any person to whom they shall sell. Witness our hands and seals this 8th of May, 1840."

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The answer of Taylor admitted all the allegations of the bill, except as to the charges that Glasgow was to sign the obligation, and as to his own insolvency at the time the contract was made; both of which he positively denied. He stated also, that the deed was made to him with the express purpose of being levied on by Knox's judgment, in order that time might be obtained thereon by his taking the benefit of the valuation law; that Hunt had paid Strong four thousand dollars of the five to be paid; and that when he and Hunt gave the obligation, he had fifty slaves, and Hunt had sufficient property to pay his debts.

The bill was taken for confessed as to Hunt; Knox filed a demurrer to it.

Alfred Simpson, on the part of Taylor, testified that he levied the Knox execution on the land in controversy, and advertised it for sale; that the object of the sale to Taylor was that the Knox execution might be levied on it; that he notified Strong that he had better secure himself if not already secure, to which Strong replied that he was willing for the land to sell.

Knox, at a subsequent term of the court, filed an answer, in which he expressed his want of knowledge as to the truth of the various allegations in the bill, of the ownership of the land, and the agreement as set up, and called for proof; he also insisted that Strong had thrust this land voluntarily in the way of his execution, and should not now be permitted to withdraw it, after he had thereby greatly jeoparded his debt.

George G. Cossett testified, that about the first of May, 1840, Taylor was in possession of considerable property, but his solvency was doubtful at that time.

James A. Hunt testified, that in November, 1841, Taylor, Strong and Hunt called on the witness to recollect, that if Strong obtained four thousand dollars' worth of Fort Pickering property and one thousand dollars they would be even; at the same time the parties left with witness this paper, to be delivered up when Strong obtained the Fort Pickering property and the thousand dollars, to wit:

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"This is to certify, that we will pay James M. Strong the interest of one and two years on the Fort Pickering land, or four thousand dollars.

"Witness our hands and seals this the 12th November, 1841.

"THOS. HUNT. (Seal.)

"W. V. TAYLOR. (Seal.)"

Thomas Hunt, in answer to this question, "Did you purchase in connection with William V. Taylor, section 1, township 2, of range 2, west, of James Mooring and Weldon Jones, trustee for James M. Strong? If yea, state the manner in which you promised to secure payment?" Answered that he did purchase the land in connection with William V. Taylor, and they executed their joint bond for five thousand dollars. He further proved, that he promised Strong that Glasgow should sign his name as surety to the obligation given by himself and Taylor; and the bond was not received by Strong as complete for want of Glasgow's name. That Taylor was involved about that time, and immediately after the purchase of this land sold fifty-three of his slaves to Glasgow; that Taylor did not know that Glasgow was to sign the obligation; that Glasgow in August, 1840, promised Strong that he would sign the bond; but he died in September of that year without doing so. That the reason the land was conveyed to Taylor was, that Taylor was bound with witness for the Knox debt, and there were other judgments against witness but none against Taylor; a deed was first made to witness, but never recorded, and afterwards made to Taylor. That witness procured an obligation from John C. McLemore, for four thousand dollars' worth of property in Fort Pickering, under an understanding with Strong, that that amount and a bond for one thousand dollars, should be taken by Strong in consideration of the five thousand dollar bond; this obligation of four thousand dollars the witness gave to Strong; but about the 10th of November, 1841, he gave Taylor an order on Strong for the four thousand dollar bond, Taylor having refused to pay the interest for two years on it; a separation thereupon took place between them all, and Strong

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had retained the bond ever since; the compromise was regarded as broken up by Taylor's refusal to pay interest on the Fort Pickering bond, that not being the original agreement.

The record of the judgment and proceedings in the case of Knox against Hunt and Taylor was also read in evidence; from that it appears, that on the 12th of May, 1840, the sheriff levied a *fieri facias* on the land in controversy; upon which the defendant, Taylor, claimed the benefit of the valuation law. The land was appraised at $6000; was offered for sale on the first day of June, 1840, and not bringing two-thirds of its appraised value, there was no sale at that time. On the 19th of July, 1841, a *venditioni exponas* issued to sell this land, which was, on the 20th of September, 1841, stayed by injunction.

On this state of pleading and proof, the vice-chancellor decreed the deed of May 6th, 1840, to be cancelled, annulled, and for naught held, and the contract in relation to said sale and purchase from said Mooring and Jones to said William V. Taylor, to be declared null and void; and the said Knox be perpetually enjoined from enforcing his judgment and execution at law against the said land, and that the title thereto be revested in Mooring and Jones, and that Hunt and Taylor should pay the costs of the suit.

From this decree Taylor and Knox appealed.

Lucas, *Watson*, and *Clapp*, for appellants, insisted,

1. That the interest of Strong, who claimed to be the beneficial plaintiff, was not proved or shown as against the appellant, Knox. They cited *Willis* v. *Argule's Ex'rs*, 6 Leigh, 567; *Young* v. *Grundy*, 6 Cranch, 51; *Moore* v. *Anderson*, 3 S. & M. 321; Sto. Eq. Pl. 217, § 261; Ib. 258, 259, §§ 318, 319; Ib. 389, § 503; 4 Russ. (Eng.) Rep. 242; Ib. 244,; Ib. 225; 2 Sim. R. 237; *Holloway* v. *Moore*, 4 S. & M. 594.

2. That the conduct of Strong had been such as to preclude him from any relief as against Knox; 1st. Because of his acquiescence in the levy of Knox's execution. They cited 19 Johns. Ch. R. 344, 354; 6 Ib. 166–168; 5 Coll. 163. 2d. Because Strong's conduct had not been equitable and pure. *Smith*

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v. *Marks*, 2 Rand. 449; *Dabney* v. *Green*, 4 Hen. & Munf. 101; Tucker's Opinion, S. C. p. 111; Fleming's Opinion, S. C. pp. 112, 113; 9 Paige, 137; 13 Peters, 107; 2 Sumn. 207. On this point counsel reviewed and commented on the testimony, and insisted that the obligation itself showed the object of the parties in making the conveyance.

3. That the sale of the land to Taylor being unconditional and absolute, the land became subject to the lien of Knox's judgment, as soon as the title vested in Taylor; the delivery of the deed was ample and unconditional, to operate immediately, and it was valid and effectual to pass the estate. 5 Barn. & Cress. 668, 671; 12 Eng. Com. Law Rep. 351; 15 Wend. 656; 2 Wash. Va. Rep. 58; 12 Leigh, 479; *Harkins* v. *Forsyth*, 11 Leigh, 294.

4. That the obligation of Hunt and Taylor was not an escrow but a complete and valid deed; *Moss* v. *Riddle*, 5 Cranch, 351; *Hicks et al.* v. *Good*, 12 Leigh, 479; 15 Wend. 545, 656.

5. That no vendor's equitable lien existed in the complainants. 1st. Because they stipulated for collateral security. 1 Mason, 190; 4 Wheat. 302. 2d. That where a vendor conveys land, he can set up no lien nor have priority of satisfaction for the unpaid purchase-money over other creditors of the vendee; 5 Yer. 205; 3 Leigh, 597; 7 Wheat. 228; 2 Humph. 145.

Mr. Justice THACHER delivered the opinion of the court.

It would seem that the decree in this case must be affirmed. The objection, that the interest of Strong in the tract of land conveyed by Mooring and Jones to Taylor is not proved or shown as against Knox, is not sustained by the record. The allegation in the bill as to the title of Mooring and Jones is, that they "held in fee to and for the use and benefit" of Strong. It is true that neither the answer of Taylor, admitting Strong's interest, nor the *pro confesso*, taken against Hunt, supplies proof as against Knox, for Knox was not such a privy of his co-defendants as would permit their evidence to affect his rights. But, the testimony of Hunt was taken after Knox had answered, in which he deposes that he purchased the tract of land in connection with Taylor from Mooring and Jones, "trustees for

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James M. Strong." The allegation in the bill as to Strong's interest was sufficient to authorize equity interposition in his behalf, and the deposition of Thomas Hunt contained sufficient proof as against Knox, of the allegation in the bill as to Strong's interest.

Also, it does not appear to be made out, that Mooring and Jones conveyed the land to Taylor for the purpose of delaying Knox in his effort to levy his debt of Taylor. Simpson's evidence, he not having been a party to the contract of conveyance, is mere matter of opinion, whereas Hunt deposes that the conveyance was made to Taylor, rather than to Hunt, expressly to avoid exposing the land to levy and sale, because Hunt was understood to be in danger of such proceedings against him, from his utter insolvent condition in the opinion of Glasgow.

In regard to the implied assent of Strong to the sale under the execution of Knox, as deposed by Simpson, the sheriff, it could only avail as a defence in the event, that a sale had actually taken place, and Strong had stood quietly by or assented in terms to his paying his money or involving his credit in such a purchase. In this instance, no sale was in reality effected, and no rights in consequence accrued to Knox.

The deed of conveyance to Taylor, from Mooring and Jones, was absolute upon its face, but having been procured upon conditions never fulfilled by the grantee, the proper relief in equity was to decree the conveyance to be annulled, and not a decree for the purchase-money to be raised by an enforcement of a vendor's lien.

Decree affirmed.

Mr. Justice CLAYTON having been counsel below, gave no opinion.

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JAMES DICK et al. *vs.* GREEN CROWDER, Administrator of James B. Crowder, deceased.

An engagement, as surety for a particular person, relates exclusively to the acts of that person alone, and will not extend to another; and the terms of a guaranty must be strictly followed.

Therefore, where J. B. C. guaranteed to D. the punctual payment of any drafts drawn by R. D. C. on D.; and R. D. C. and J. J. C. jointly drew a draft on D., it was held, that this draft was not within the specific terms of J. B. C.'s guaranty; and the latter it seems would not be bound for its payment.

Yet a guaranty, given upon a settlement of accounts which had been disputed, contains a sufficient consideration; where, therefore, J. B. C. guaranteed the payment of R. D. C.'s drafts on D.; and R. D. C. and J. J. C. *jointly* drew on D.; and R. D. C. also individually drew on D.; and upon a settlement of accounts between D. and J. B. C., the latter executed his individual note to D., for the balance due on his own account, and also on the joint draft of R. D. C. and J. J. C., and the individual draft of R. D. C.; and subsequently J. B. C., by an agreement with D., arranged this note, by having the account of R. D. C. and J. J. C., deducted out of it for the amount of their joint draft, and of R. D. C.'s individual draft, after paying the residue of the note, executing his guaranty to pay the amount of R. D. C. and J. J. C.'s joint and separate drafts; it was held, that the latter guaranty had a sufficient consideration to uphold it, even though *originally* J. B. C. were not bound on his first guaranty for the joint draft of R. D. C. and J. J. C.

Where J. B. C., having given D. a guaranty to pay the drafts of R. D. C. on him, took up the balance due by R. D. C. to D., for drafts thus drawn on D., by executing his individual note to D.; afterwards procured D. to take his (J. B. C.'s) guaranty of the payment by R. D. C. of the latter's account to D., instead of the note; it was held, that the liability of J. B. C. to D., having thus become *secondary*, where it was formerly *primary*, was a sufficient consideration to the second guaranty.

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James Dick, William J. McLean, and Harry R. W. Hill, surviving partners of Nathan Dick and James Bodker, who were in business under the firm of N. & J. Dick & Co., sued Green Crowder, administrator of James B. Crowder, upon two guaranties. The first Count was based upon the following guaranty — to wit:

"*Pittsburg, February 26th*, 1836.

"Messrs. N. & J. Dick & Co., Sirs, — I hereby guaranty to you the punctual payment of any draft or drafts that may hereafter be drawn on you by Ransom D. Crowder, and accepted, to the amount of twenty thousand dollars; and I further guaranty the payment of 2½ per cent. commissions for accepting said drafts, and interest after due at the rate of ten per cent. per annum, if not punctually paid by the drawer.

Yours respectfully,

J. B. CROWDER. [SEAL.]"

The second and third counts were on the second guaranty, which is as follows:

"Messrs. N. & J. Dick & Co., — I wish you to charge R. D. Crowder with the within amount of eight thousand eight hundred and three dollars $\frac{3}{100}$, and take it out of my account. I hereby guaranty to you the payment of the amount, with ten per cent. interest. April 5, 1843. $8803\frac{3}{100}$.

J. B. CROWDER."

There were also the common money counts.

The plea was the general issue.

The case was submitted to a jury, who found for the defendant. From the bill of exceptions, the following facts appear: After reading the guaranties, the plaintiffs proved by the depositions of James L. McLean and Matthew R. May, that, on the 5th of April, 1841, Ransom D. Crowder owed N. & J. Dick & Co., $8,803.03; and J. B. Crowder executed his guaranty to pay it, and promised to remit the amount of it to N. & J. Dick

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& Co., when he arrived in Mississippi; this guaranty having been executed in New Orleans, in the counting-room of N. & J. Dick & Co.; and that this sum of $8,803.03, consisted of the balance due on the drafts of R. D. Crowder on N. & J. Dick & Co., with interest and commissions. These witnesses were both clerks in the commission house of plaintiffs, and filed with the depositions, the various accounts against the different parties, showing their respective dealings. From these it appears, that, on the 27th of February, 1836, R. D. Crowder and J. J. Crowder jointly drew a draft on N. & J. Dick & Co., for ten thousand dollars, which the latter paid; and on the 15th of February, 1837, R. D. Crowder drew a draft on them for five thousand dollars, which they paid. There were also other dealings between the parties, and on the 18th of May, 1839, James B. Crowder executed his note to N. & J. Dick & Co., for the sum of $16,095.93, maturing on the 21st of January, 1840; this note embraced the individual account of James B. Crowder, and $12,421.31 of the account of R. D. Crowder, being the balance due on the joint draft for ten thousand dollars, and R. D. Crowder's individual draft for five thousand dollars.

James B. Crowder paid all of his own indebtedness to N. & J. Dick & Co., and the sum of 341.93 of the indebtedness of Ransom D. Crowder; the latter paid also a considerable sum on his indebtedness to N. & J. Dick & Co.; and, on the 5th of April, 1841, James B. Crowder, having gone to New Orleans for that purpose, had a settlement of accounts with N. & J. Dick & Co., and, on that day, executed his guaranty for the $8,803.03, being the balance due by Ransom D. Crowder; and which was previously included in his (James B. Crowder's) note for $16,095.93; the accounts having been separated at J. B. Crowder's request. There was other testimony in the case, with reference to the condition of mind of James B. Crowder, at the time he gave the latter guaranty; it was not, however, passed upon by the court, and is not here further noticed. No demand on R. D. Crowder, of the amount of the account guaranteed, or notice of the non-payment to James B. Crowder, was proved.

The plaintiff asked the court for these instructions, viz.:

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"Though James B. Crowder might not have been liable, as guarantor, under the first guaranty, on the ten thousand dollar draft, drawn by R. D. & J. J. Crowder, jointly, yet if the said draft was accepted and paid on the faith of said first guaranty, and said James B. Crowder afterwards acknowledged his liability on said draft, by an express promise to pay it, then said first guaranty, and the accepting and paying said drafts, are a sufficient consideration for the second guaranty, if the jury believe that the debt guaranteed is a balance due by R. D. Crowder on the indebtedness incurred by him on the $10,000 and the $5,000 drafts." This instruction was refused.

Other instructions were given, both for plaintiffs and defendant. The plaintiffs below prosecute this writ of error.

George S. Yerger, for plaintiffs in error.

1. No demand or notice was necessary. The guaranty was to pay an existing debt; in such case the power is absolute, and if the principal has not paid the debt, the guarantor may be sued, without demand of principal. 4 S. & M. 98; 10 Peters, 496: 2 S. & M. 147; *Breed* v. *Hillhouse*, 7 Conn. R. 523; *Allen* v. *Rightmere*, 20 Johns. R. 365; *Upham* v. *Prince*, 12 Mass. R. 14; 14 Johns. R. 350; 7 Greenl. 186, 192; 4 Ib. 42; *Taylor* v. *Ross*, 3 Yerg. 335; 2 Johns. Cases, 409; 11 Wend. 100.

2. The execution of the note by James B. Crowder, for the amount due by Ransom D. Crowder, was an express promise to pay, which waived all necessity of demand and notice; and was a sufficient consideration to uphold the second guaranty, even if the $10,000 draft were not included in the first guaranty. 7 Peters, 113; 12 East, 227; 2 Gill & Johns. 23; *Robbins* v. *Pinkard*, 5 S. & M. 51; *Breed* v. *Hillhouse*, 7 Conn. R. 523. These cases are in point, and the last is recognized as law in the first.

3. The draft of $10,000, though joint, was yet covered by first letter of guaranty. 5 Yerg. 109; Chitty on Bills, 568, 569.

James K. Lea, on the same side.

1. The changing the liability of the guarantor from principal

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to surety is a good consideration; the plaintiffs sustain an injury, and the defendant receives a benefit by the change of the character of the liability. In this case defendant's promissory note was given up on consideration of the guaranty. It has been held in analogous cases, that the giving up an uncertain claim is a good consideration to support a promise. See *Flagg* v. *Upham*, 10 Pick. 147; 3 Burrows, 1665; Chitty on Con. 411, 423; Comyn on Con. 262; 2 Ld. Ray. 759.

2. That when the original contract and the guaranty are cotemporaneous, parol proof is admissible to show what the consideration was. Story on Prom. Notes, 459, and note 1; and the record shows a full consideration.

W. Brooke, on the same side, relied on the same points.

Acee, for defendant in error, insisted,

1. That James B. Crowder was not liable for the $10,000 draft. He cited 2 Term R. 370; 2 Taunt. 206; Com. on Con. 268; Story on Prom. Notes, 559; 2 Kent's Com. 121; Fell on Guaranty, 1; Chitty on Con. 415; *Russel* v. *Perkins*, 1 Mason's C. C. R. 368.

2. James B. Crowder is not liable for the $5000; the plaintiffs sue as survivors; the draft was drawn on the plaintiffs, as the witness swears; the guaranty was to the whole firm; the death of one of the partners suspended its operative effect. *Cremer* v. *Higginson*, 1 Mason C. C. 323; *Weston* v. *Barton*, 4 Taunt. 673; Com. on Con. 256; *Penoyer* v. *Watson*, 16 Johns. R. 100; *Myers* v. *Edge*, 7 Term R. 254; *Walsh and Beekman* v. *Baillie*, 10 Johns. R. 180.

3. The terms of a guaranty must be strictly pursued, or the guarantor will not be bound; if he proposes a credit, that particular credit must be given, or he will not be liable. *Walrath* v. *Thompson*, 6 Hill's R. 540; *Smith and Crittenden* v. *Dann*, Ib. 543; *Wright* v. *Johnston*, 8 Wend. 513.

4. The payments made by Ransom D. Crowder, discharged the guarantor. *Webb* v. *Dickinson*, 11 Wend. 62; *Baker* v. *Stackpoole*, 9 Cow. R. 420.

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5. The second guaranty was subsequent to the creation of the debt, and requires some consideration, *aliunde* from the original consideration. Story Prom. Notes, 560. A different consideration from that expressed in the guaranty cannot be shown. *Schemerhorn* v. *Vanderheyden*, 1 Johns. R. 139; *Winchell* v. *Latham*, 6 Cow. 690. It is incumbent on plaintiffs to show the consideration. *Manrow* v. *Durham*, 3 Hill's R. 584; *Miller* v. *Gaston*, 2 Hill's R. 188.

6. The new trial should not be granted unless the verdict is greatly against the weight of testimony. *Jenkins* v. *Whitehead*, 1 S. & M. 157; *Dickson* v. *Parker*. 3 How. (Mi.) R. 219; *Baynton* v. *Finnall*, 4 S. & M. 193; *Leflore* v. *Justice*, 1 Ib. 381.

Mr. Justice THACHER delivered the opinion of the court.

This is an action upon the following guaranties: one, dated February 26th, 1836, in these words: "Messrs. N. & J. Dick & Co. I hereby guaranty to you the punctual payment of any draft or drafts that may be hereafter drawn on you by Ransom D. Crowder, and accepted to the extent of $20,000. And I further guaranty the payment of 2½ per cent. commission for accepting said drafts, and interest after due, at the rate of 10 per cent. per annum, if not punctually paid by the drawer. J. B. Crowder." The other, dated April 5th, 1841, in these words: "Messrs. N. & J. Dick & Co. I wish you to charge R. Crowder with the within account of $8,803 $\frac{3}{100}$, and take it out of my account. I hereby guaranty to you the payment of the account with 10 per cent. interest. J. B. Crowder." After the first guaranty was given, R. D. Crowder, jointly with J. J. Crowder, drew upon N. & J. Dick & Co. for $10,000, and R. D. Crowder alone drew upon them for $5,000. In May, 1839, J. B. Crowder gave J. & N. Dick & Co. his note for $16,095.98, which amount included his own account to the house, and also that of R. D. Crowder, which embraced the amounts unpaid of the two drafts of $10,000 and $5,000. Soon after this note matured, J. B. Crowder settled his indebtedness to the house by paying his individual account, by paying the

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sum of $341.93 on account of R. D. Crowder, and by inducing the house to separate their charge against R. D. Crowder from his own account. In consideration of this, he gave the second guaranty for the sum of $8,803.03, which was the balance due by R. D. Crowder upon his two drafts, after deducting payments made by him, and is the sum sought to be recovered in this action.

A question made in the case, is whether the draft of $10,000, drawn jointly by R. D. and J. J. Crowder, was protected by the guaranty first executed. This draft was not within the specific terms of the guaranty, which was limited to drafts drawn by R. D. Crowder only. The general rule is laid down to be that an engagement as surety for a particular person has exclusive relation to his acts alone, and will not extend to the acts of another; and that the terms of a guaranty must be strictly followed. Com. on Con. 268; 1 Mason's C. C. R. 368.

Under the circumstances of this case, however, more consideration is given to this question than it warrants. The draft of $10,000 was obviously accepted on the faith of the first guaranty. Admitting that the liability of J. B. Crowder, under the first guaranty, was doubtful and disputed, he recognized it by giving his note for $16,095.98; and a guaranty given upon a settlement which had been disputed contains a sufficient consideration. Again, J. B. Crowder was acquainted with the nature and extent of the first guaranty, and he was also informed of the mode in which the draft for $10,000 had been drawn, as he was shown the account current of R. D. Crowder with the house. With a view of all these things, he acknowledged his own liability for R. D. Crowder, by giving a note including his liability, and subsequently he made an express obligation to guarantee its payment, by which he waived any objections he had to the draft of $10,000, and constituted a good consideration for the second guaranty. This guaranty, having also been given in consequence of an agreement to separate the amount of R. D. Crowder's account from the account of J. B. Crowder's account, was so much a payment of the note of $16,095.98. Thus J. B. Crowder's liability *pro*

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tanto was placed secondary to the house where he had been before bound in the first instance. This likewise created a good consideration. *Flagg* v. *Upham*, 10 Pick. 147.

The first instruction, asked by the plaintiffs in the court below, embodied the foregoing principles, and was erroneously refused by the court.

Judgment reversed, and new trial awarded.

McCarty B. Melvin et als. *vs.* Aurora Lyons.

Where, in an action of detinue for the recovery of certain slaves, upon the trial in the circuit court, the plaintiffs offered in evidence a copy of a will, duly attested under the act of congress on the authentication of records, which will purported to have been duly probated in the state of Virginia, and under which will the plaintiffs claimed title, as devisees and the heirs of devisees, the refusal of the circuit court to admit the copy in evidence, because there was no proof that the will had been proved and admitted to record in any probate court in this state, was held to be error.

It is a general rule, that before any testamentary paper can be admitted in evidence, it must receive probate of the proper court.

The copy of a will, which has been duly probated in any state in the union, is admissible in evidence in this state, when certified according to the act of congress of May 26, 1790, prescribing the mode in which the public acts, records and judicial proceedings in each state shall be authenticated, so as to take effect in every other state.

It seems, that the statute of this state, (H. & H. 388, § 13,) which provides that authenticated copies of wills, proved according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, may be offered for and admitted to probate in the probate courts of this state, but subject to be contested and controverted in the same manner that the original might be, was not designed to establish a rule for the admissibility of a copy of such will, in evidence on a trial in the circuit courts, at the suit of persons claiming under such will, in the face of the act of congress of May 26, 1790, no such rule, even if designed, would be valid.

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In error from the circuit court of Adams county; Hon. Thomas A. Willis, judge of the second judicial district, presiding.

This was an action of detinue, brought by McCarty B. Melvin, Mary McCarty Melvin, James Melvin, Sarah Eliza Melvin, Mehitable Melvin, Freelove Melvin and Mary Melvin, the said Sarah Eliza, Mehitable, Freelove and Mary being minors, and suing by the said James Melvin, their next friend, against Aurora Lyons, for the recovery of certain slaves. Upon the trial, the plaintiffs offered to introduce, in evidence, the will of Mary McCarty, which was properly authenticated, according to the act of congress on that subject, as having been admitted to probate in Fairfax county, in the state of Virginia, where the said Mary McCarty died. The defendants objected to the reading of this will, because there was no proof that it had been proved and admitted to record in any court of probate in the state of Mississippi; which objection was sustained by the court below. And to this opinion the plaintiffs excepted; and prosecuted this writ of error.

Sanders and *Price*, for plaintiffs in error, contended,

1. That the 13th and 14th sections of the law in How. & Hutch. 388, applied only to the case where the executor or other representative of a deceased testator, whose will had been admitted to probate abroad, desired to obtain letters testamentary or of administration with the will annexed in this state, in order to administer upon such estate as in other cases of administration; and did not apply to cases where a party claimed under such will as devisee, property embraced in it, and insisted upon his absolute right of property under the will.

2. That these sections never could have been intended to establish a rule of evidence for the admissibility in evidence of foreign probated wills.

Such a construction would lead to incalculable mischiefs, and become the fruitful instrument of fraud; and would, moreover, conflict with that provision of the federal constitution, which provides; "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other

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state, and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

J. T. McMurran, for defendant in error.

1. By the provision of our statute, a foreign probated will is admitted to record and subject to the same contest as the original will would be in our probate court. But the party would be deprived of this right if the copy could be admitted in evidence, as contended for by the opposite counsel; it would be conclusive on him.

2. Wills probated in a foreign country and sister state, stand alike under our statute, and we refer the court to the decision of the supreme court of the United States in the case of *Armstrong* v. *Lear*, 12 Wheat. R. 169, 176, in support of our position.

Until the will shall be probated in our own state, a copy of it is inadmissible, and it is of no legal validity. The case of *Kerr* v. *Moon*, 9 Wheat. R. 565–571, is to the same effect with the decision in 12 Wheaton.

Mr. Justice THACHER delivered the opinion of the court.

This is an action of detinue for the recovery of certain slaves. Upon the trial in the circuit court, the plaintiffs offered, in evidence, a copy of a will, duly attested under the act of congress on the authentication of records, which will purported to have been duly probated in the state of Virginia, and under which will the plaintiffs claimed title as devisees and the heirs of devisees. The circuit court refused to admit this instrument in evidence, because there was no proof that the will had been proved and admitted to record in any probate court in the state of Mississippi.

Before any testamentary paper can be admitted in evidence, it must receive probate of the proper court. This is the general rule. The case of *Armstrong* v. *Lear*, 12 Wheat. 169, quoted by the counsel of the defendant in error, was a suit instituted against the administrator of General Kosciusko, but the will did not appear to have been admitted to probate, either in France

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or in the District of Columbia, where the suit was instituted. Judge Story said, "it is one thing to possess proofs, which may be sufficient to establish, that a testamentary instrument had been executed in a foreign country, under circumstances which ought to give it legal effect here; and quite a different thing, to ascertain what is the proper tribunal here, by which those proofs may be examined, for the purpose of pronouncing a judicial sentence thereon." The case before us is, however, widely different. The will had been duly probated in one of the states of the union, and was admissible in evidence by virtue of the act of congress of May 26, 1790, prescribing the mode in which the public acts, records, and judicial proceedings in each state, shall be authenticated so as to take effect in every other state.

We cannot think that the statute of this state, How. & Hutch. 388, § 13, was designed to establish a rule of evidence in circumstances like this, or that it could do so in face of the act of congress. It seems to have been enacted for a different purpose.

Evidence of the kind here objected to has been repeatedly admitted in our courts without question, nor do we see that any objection to it can reasonably be started. *Newell* v. *Newell et al.* 9 S. & M. 56.

Judgment reversed and new trial granted in Adams county circuit court.

RANSOM H. BYRNE ET AL. *vs.* NATHANIEL ANDERSON AND OTHERS, Trustees for the Farmers and Merchants Bank of Memphis.

Where an execution is levied on property, subject to an older deed of trust, in favor of other parties, it seems doubtful whether the court of chancery has jurisdiction to interfere in behalf of the beneficiary under the deed of trust, by injunction against the sale under the execution.

Yet where such injunction is granted in the court below, and the question of jurisdiction not raised by demurrer in that court, the high court of errors and appeals will not throw any obstacle in the way of the relief sought.

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A. and others filed their bill, alleging that they held a deed of trust on certain slaves of P., to secure the payment of a debt due to them; and that B. having a junior judgment against P., had levied an execution on the slaves; B. in his answer, set up that P. had made the complainants various payments, and but little was due on the deed of trust; the court below made the injunction perpetual, and ordered the slaves to be delivered to the trustees: *Held* by this court, that all the matters in controversy should be adjusted in this suit, and that the proper decree would be, for an account to be taken in the court below of what was due complainants; and a sale under the deed of trust ordered to pay what was thus found due, and the injunction against the execution at law made perpetual as to the property sold to pay the debt due to complainants; and the residue of the property levied on, if any remain, to be subjected to sale under the execution.

On appeal from the district chancery court at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

The facts of this cause will be found sufficiently stated in the opinion of the court.

William F. Stearns, for appellants, insisted the bill should be dismissed, because the complainants had an adequate and unembarrassed remedy at law, either by a trial of the right of property or an action of replevin.

John W. Watson, for appellees.

Mr. Justice Clayton delivered the opinion of the court.

This case comes up from the district chancery court at Holly Springs.

The Farmers and Merchants Bank of Memphis held a deed of trust upon certain slaves of John N. Phifer, to secure the payment of a debt due to it. Byrne became the owner of a judgment against Phifer, and caused an execution to be levied upon the slaves thus conveyed to the bank. This bill was filed to enjoin the sale under the execution, by the trustees in behalf of the bank. The injunction was made perpetual in the court below, and the slaves directed to be surrendered to the trustees.

The deed of trust is older than the judgment of Byrne, and

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there is no evidence to show that it is fraudulent; on the contrary, the transaction appears to have been a fair one. It was therefore proper to make the injunction perpetual to some extent. Payments have been made upon the deed of trust, and the answer insists that but little is due upon it. It is certain that the bank has no claim to more of the property, than will satisfy what is due upon the debt secured. It will be better to settle the whole matter of controversy in this suit, and so put an end to the litigation. The amount due should have been ascertained, as it was disputed, before the whole injunction was made perpetual.

The decree will be reversed, and the cause remanded, with directions for an account to be taken of what is due upon the deed of trust to the bank. Upon the coming in of that account, the injunction will be made perpetual, as to so much of the property as will be required to pay the sum so due, to be ascertained by sale under the deed of trust, and the balance of the property levied on, if any remain, will be subject to sale under the execution.

In regard to a mere incumbrancer, it is doubtful if the court of chancery has jurisdiction to interpose in his behalf by injunction. See *Bowyer* v. *Creigh*, 3 Rand. 25. But as the point has not been raised by demurrer, we shall not throw any obstacle in the way.

Decree reversed, and cause remanded.

GEORGE R. DEUT, President of the Board of Trustees of School Lands in the County of Jefferson, *vs.* JOHN B. COLEMAN ET AL.

Where, to an action on a note, the defendant plead an accord and satisfaction by the sale and conveyance of a tract of land, which the plaintiff accepted and received in discharge and satisfaction of the note, to which plea the plaintiff replied, denying both the conveyance of the land to him, and his acceptance of it, it was *held*, on demurrer to the replication, that it was a

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good answer to the plea, and was neither double, uncertain, nor objectionable.

A plea to an action on a note, made by several, that two of the defendants were sureties of the principal debtor, and that for a valuable consideration paid to the plaintiff, he gave indulgence to their principal for twelve months, without their consent or agreement, is a good plea in bar of the action.

On overruling a demurrer to a plea to one count of a declaration, it is error to give judgment on the whole declaration in favor of the defendants; the plaintiff might establish his case under the second count against them.

Under the act of 1840 (Sheet Acts, p. 133,) to regulate the practice of the circuit courts, which provides, "that if it be discovered that the pleadings are defective, it shall be the duty of the court, and the judge holding the same, is hereby required to cause the same to be amended and perfected, so that the merits of the controversy shall be fairly put to the jury," it is no longer in the discretion of the circuit courts to grant amendments, but it is matter of obligation and of right.

Therefore, where the plaintiff in an action filed a replication to the plea of the defendant, and the court below thought the replication bad, it was held by this court, that instead of turning the plaintiff out of court, the judge should have caused an amendment to be made, suited to his views of the law, and thus have secured a trial on the merits.

In error from the circuit court of Claiborne county; Hon. George Coalter, judge.

George R. Deut, President of the Board of Trustees of School Lands, of township number ten, range one east of the basis meridian, in the county of Jefferson, and state of Mississippi, sued John B. Coleman, Asa P. Jones, and Levi C. Harris, in assumpsit, upon a promissory note. The declaration contained the count upon the note, and the common counts. The defendants plead ten pleas; part of which only it will be necessary to notice. One was as follows: "And for a further plea in this behalf, as to the said first count of the said declaration, the said defendants by leave, &c., say, *actio non*, &c., because they say, that, after the making of the promissory note in the said first count mentioned, and before the day of payment in the said note specified, to wit, on the 10th day of March, A. D. 1841, at the county aforesaid, the said defendant, Coleman, bargained, sold, and conveyed to the said plaintiff, a certain tract of land, situate in the county of Jefferson, aforesaid, in

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full satisfaction and discharge of the said promissory note, in said first count specified, which the said plaintiff then and there accepted and received in full payment and satisfaction of the said promissory note in said first count mentioned, and this the said defendants are ready to verify."

To this plea, the plaintiff replied, "that the said defendant, Coleman, did not bargain, sell, and convey unto him, the said plaintiff, a certain tract of land, situate in the county of Jefferson, in full satisfaction and discharge of the said sum of money in the said promissory note in the said plaintiff's declaration mentioned, and that he, the said plaintiff, did not then and there receive and accept the same, in full satisfaction and payment of the said sum of money in the first count of the plaintiff's said declaration mentioned, and this he prays may be inquired of by the country," &c.

To this replication, the defendant demurred, and assigned for cause, that it was broader than the plea, was double, and tendered two issues; was not an answer to the plea, and contained a negative pregnant.

The court sustained the demurrer to this plea, and gave judgment final thereon for the defendants.

The defendants, James and Harris, also plead, in substance, that they were the sureties of their co-defendant, Coleman, and that for a valuable consideration paid to the plaintiff, he gave indulgence to Coleman for twelve months, on the note sued on, without their consent or agreement. These pleas extended only to the first count. The plaintiff demurred to them, and the court overruled the demurrer, and entered judgment final thereon for defendants. There were various other pleas, declarations, and demurrers, but they were not passed on by this court.

Deut prosecutes this writ of error.

J. [redacted]asher, for plaintiff in error.

1. The traverse in the replication, was an exact denial of the plea, and nothing more; and if objectionable, the plea was equally so. 1 Chit. Pl. 594; 4 T. R. 157. *Robinson* v. *Rayley*,

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1 Burr. 316; *Botls* v. *Purvis*, 2 Black. 1028. *Jones* v. *Kitchen*, 1 B. & P. 80, Op. of Eyre, Ch. J.; *Strong* v. *Smith*, 3 Caines, 160; Willes, 410; *Strong* v. *Smith*, 3 Caines, 165.

2. The replication and plea both being bad, if either, the judgment should have been for the plaintiff, on sustaining the demurrer to the plea. *Miles* v. *Myers*, Walk. R. 379; *Wren* v. *Spaun*, 1 How. (Mi.) Rep. 115.

3. The plea of accord and satisfaction was bad, because Deut, the president, sued in his fiduciary capacity upon a note payable to him in his trust character. By the statutes which create him, and confer all his power on him, he had no power to take the land in discharge of the note, even if he had done so; in doing so, he would transcend his power, and his act would be void. Acts of 1836; *How. & Hutch.* 136, 650; 6 How. 328; 1 S. & M. 17; 3 S. & M. 609; 2 S. & M. 81; Ib. 514; 1 S. & M. 248; 3 How. (Mi.) Rep. 314; 7 S. & M. 24; 3 S. & M. 271; Ib. 468; 7 How. (Mi.) Rep. 408; Ib. 554; *Prosser* v. *Leatherman*, 4 How. (Mi.) Rep. 237; 9 Cow. 320.

4. The court certainly erred in giving judgment on the whole declaration on demurrer, to pleas which only purported to extend to the first count in the declaration.

5. The pleas which set up an extension of time to the principal, are bad. 1 Holt, 84; *Reynolds* v. *Ward*, 5 Wend. 505; 4 How. (Mi.) Rep. 690; *McLemore* v. *Powell*, 12 Wheat. 554; 1 Leigh. 436.

James H. Maury, on the same side, relied on the same points taken by Mr. Thrasher, and commented on them.

H. T. Ellet, for defendant in error.

1. The decision of the court below, which goes to the whole case, and sustains the final judgment in favor of the defendants below, was given on the demurrer to the replication to the third plea. Gould's Pl. 431, sec. 24.

2. The replication is bad. It is competent to traverse several facts going to constitute one point of a plea, but not several points requisite to make a good plea. 1 Chitty Pl. 557.

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To a plea of accord and satisfaction, the delivery and acceptance cannot both be denied. 1 Saund. Pl. and Ev. 24; 1 Chit. Pl. 553, 589, 592; Steph. Pl. 256.

For the form of the plea and replication, see 1 Saund. Pl. and Ev. 26; Story on Pleading, 174.

The plaintiff may reply either that there was no such accord, or, that the defendant did not pay or deliver in satisfaction; or that he himself did not accept or receive in satisfaction; either of which is traversable. Story's Pl. 176; citing 5 Mod. 86; 2 Salkeld, 627.

Declaration in covenant to make a deed on request, and alleging a request and refusal. Plea traversing both request and refusal, held bad. *Connelly* v. *Pierce*, 7 Wend. 130.

Plea that the note sued on was made jointly with B., and that the plaintiffs have released B. A replication, traversing both the joint making and the release, was held bad. *Tubbs* v. *Caswell*, 8 Wend. 129.

Where several facts are traversed, it must be done in the disjunctive, not copulative. *Goram* v. *Sweeting*, 2 Saund. R. 207; 1 Bing. N. C. 323; 5 Dowl. 162.

If the demurrer was properly sustained to this replication to the third plea, the final judgment in favor of all the defendants must be affirmed. Gould Pl. 431, sec. 24.

3. These pleas, pleaded by the sureties, are good. The fifth alleges the giving of time to the principal debtor, without consent of the sureties, in consideration of the payment of five hundred dollars on account of the note sued on. *Newell et al.* v. *Hamer et al.* 4 How. 692; *Rupert* v. *Grant*, 6 S. & M. 433–439.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an action of assumpsit with two counts upon a promissory note, in which there are ten pleas, four replications and nine demurrers, from which the merits of the case are to be extracted. It will be unnecessary to give to each a separate examination. The issues of fact are yet undisposed of; but judgment was rendered for the defendants below upon the issues in law.

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The third and fourth pleas set forth an accord and satisfaction, by the sale and conveyance of a tract of land, which, it is alleged, the plaintiff accepted and received in full discharge and satisfaction of the claim. The replications to these pleas deny both the conveyance and the acceptance; and on this state of pleadings judgment was rendered for the defendants in the court below.

It is insisted in argument that the replications are bad; that they might properly deny either the conveyance or the acceptance, but they ought not to deny both. To this we reply, that the replications as they stand constitute but one answer to the pleas. The conveyance and acceptance in satisfaction are both averred in the pleas. It might possibly have been sufficient to deny either, but it was not improper to deny both. The gist of the plea was the satisfaction of the claim; the substance of the replication was the denial of the satisfaction, a plain and simple issue not broader than the pleas, nor involving duplicity, uncertainty or other objectionable matters. The judgment of the court below, on this point, was erroneous.

In the fifth and sixth pleas, two of the defendants aver that they were the sureties of the defendant, John B. Coleman, and that for a valuable consideration paid to the plaintiff, he gave indulgence to their principal for twelve months, without their consent or agreement. These pleas however, on their face, are confined to the first count in the declaration. The plaintiff filed demurrers to them, which were overruled by the court, and final judgment rendered for the two defendants.

There is no valid objection to these pleas, and the demurrer was properly overruled; but as they extended only to the first count in the declaration, it was error to give judgment on the whole declaration in their favor. By possibility the plaintiff might establish his case under the second count against them, and the court could not, in advance of the trial by the jury, on the plea of *non assumpsit*, determine that point.

Some of the demurrers were decided in favor of the plaintiff in error, and as the defendants have not complained of this, it is not necessary to speak of them.

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The third section of the act of 1840, to regulate the practice of the circuit courts, in substance provides, "that if it be discovered that the pleadings are defective, it shall be the duty of the court, and the judge holding the same is hereby required to cause the same to be amended and perfected, so that the merits of the controversy shall be fairly put to the jury." Acts of 1840, p. 133.

Under this law, what was formerly *discretion* in the circuit courts, in regard to amendments, has become matter of *obligation* and of *right*. When it decides any portion of the pleadings to be defective, it should also direct the same to be amended and perfected, so as to place the merits of the controversy fairly before the jury. In this case, instead of turning the plaintiff out of court, for a supposed defect in his replication, the judge should have caused an amendment to be made, suited to his views of the law, and thus have secured a trial upon the merits.

We have no doubt that the intention of the legislature, in passing this law, was to prevent the decision of causes, upon any other ground than their merits, and we shall do all in our power to carry that intention into effect. See *Price* v. *Sinclair*, 5 S. & M. 258.

The judgment is reversed, and cause remanded for further proceedings.

GEORGE G. TORREY ET AL. *vs.* GEORGE W. GRANT.

Under the statute of this state which prohibits the taking, directly or indirectly, for any contract, bond or note for the payment of money, founded on any bargain, sale, or loan of wares and merchandise, goods and chattels, lands and tenements, or any use or occupation thereof, more than *eight* per cent. interest, a sale of a tract of land and negroes, estimated at a *cash price* of fifty-three thousand dollars, on a credit of six years, the different instalments bearing *ten* per cent. interest *per annum*, is usurious; although the statute authorizes the taking of ten per cent. on a *bona fide* loan of money.

If a note be affected with usury in its origin, every renewal or change of

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the security is equally affected; nor will the usury be cured when a greater sum than the usurious interest is paid on the debt.

The indorsee of an usurious note, who at the time he obtained the note had knowledge of the usury, cannot recover thereon beyond the principal sum, even though he took the note upon the assurance of the maker that he would make no defence to it; the consideration being an illegal one, the waiver of the defence was not binding on the maker as to a party having notice; it would be otherwise with a mere failure of consideration.

In error from the circuit court of Claiborne county; Hon. Thomas A. Willis, judge.

George W. Grant sued George G. and P. H. Torrey, on a note made by them dated March 2d, 1841, for $1700, payable to the plaintiff or order, on or before the 1st of January, 1842, at the Branch of the Planters Bank at Port Gibson.

The defendant below then proved by Alexander Torrey that the note sued on was given in renewal of a balance due on a note for $6000, dated February 13, 1841, given by said P. H. Torrey, G. G. Torrey, and Alexander Torrey, to the plaintiff, due January 1, 1842; and that at the time of the renewal, $4300 was paid on the note of $6000, by delivering negro slaves to that amount to the said plaintiffs. That the note of $6000 was given in renewal of a note for $12,000, dated January 12, 1838, given by Alexander Torrey, G. G. Torrey, and George Hill to Saxton Shaw, and indorsed by Saxton Shaw and Mark A. Mitchell to plaintiff, due January 1, 1842. And that, at the time said note of $6000 was given, the sum of $6000 was paid on said note of $12,000, by delivering negro slaves to the plaintiff to that amount. The witness was one of the makers of the first note, and his name stands first on it, but it was given on a joint purchase of property.

The defendants below further proved by N. McDougall, that the above mentioned note for $12,000, was one of six notes of the same amount, given by Alexander Torrey, G. G. Torrey, and George Hill, to Saxton Shaw, for the purchase-money of a plantation and negroes. Witness wrote the notes and the deed of conveyance, which were executed in his presence. That the consideration of said notes was as follows, to wit:

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23 negroes, at $1000 each,	$23,000
1353 71/100 acres of land, at $22.25 per acre,	30,119.15
	$53,119.15

Which sum was divided into six annual payments of $8,853.19 each, to which interest at ten per cent. per annum, from January 1, 1838, was added, as follows, to wit:

Int. on	1st	instalment	1	yr.	to	Jan.	1, 1839,	$885.31
"	"	2d	"	2	yrs.	"	" 1840,	1770.62
"	"	3d	"	3	"	"	" 1841,	2555.93
"	"	4th	"	4	"	"	" 1842,	3541.24
"	"	5th	"	5	"	"	" 1543,	4426.56
"	"	6th	"	6	"	"	" 1844,	5311.86
								18,591.51
								71,710.66
Three horses and some farming utensils,								289.34
								$72,000.00

Which sum of $72,000, was divided into six annual payments of $12,000 each, and notes given, payable respectively, on the 1st of January, 1839, 1840, 1841, 1842, 1843, and 1844.

The defendants below also proved by Thomas H. Wade, that he was present during the trade, and also when the notes were given. That it was a cash transaction, and ten per cent. interest was added to the notes for the time that was given on the payments.

The defendants also proved by Alexander Torrey, that the plaintiff below, (Grant,) told him that, while on the trade for the note of $12,000, both Shaw and the witness had informed him that there was ten per cent. interest on the price of the negroes included in the note. And also that the plaintiff below obtained said note in payment of an old debt due him by Saxton Shaw.

The plaintiff then read in evidence a letter of said Alexander Torrey to the plaintiff, dated January 23, 1839, as follows:

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"Dr. Grant, — Dear Sir, — I cannot give you as correct an answer as I could wish to do; but I can say to you that the notes given by myself, G. G. Torrey and Geo. Hill, are all entitled to a credit, except one in the hands of a Mr. Miller, and one in the hands of some person unknown to me. I have every confidence in Mr. Shaw, and expect he has put the proper credit on the paper. We returned seven negroes to Mr. Shaw, at the price we bought — $1000 each — with ten per cent. interest. You can make the calculation, and see whether he has given the proper credit on each note.

Very respectfully yours, &c.

ALEXANDER TORREY."

And plaintiff proved by said Torrey that he believed said letter was written before the plaintiff became the owner of the $12,000 note.

Plaintiff below read in evidence the following letter, dated September 25, 1839:

"Dr. Grant, — Dear Sir, — The note drawn by myself, G. G. Torrey and Geo. Hill, and which Mr. Shaw traded to you, is entitled to no credit, and I hold no offsets against it.

Yours, &c. ALEXANDER TORREY."

The plaintiff then read in evidence two bills of sale for negroes, constituting the payment of $6000, on the note for $12,000, and the payment of $4300, on the note for $6000.

The plaintiff then offered to read a letter from said A. Torrey to plaintiff, dated February 5, 1841, offering to pay the balance due on the paper held by plaintiff against said A. Torrey and his brother, in negroes, provided plaintiff would agree to take some children.

This letter was objected to, but permitted to be read, and the defendants below excepted.

At the request of the plaintiff's counsel, the court charged the jury as follows, to wit:

"If the jury believe from the evidence that the note sued on

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was given in discharge of a note drawn by Alexander Torrey, G. G. Torrey and George Hill, and of which note the plaintiff was the *bona fide* holder, and that there was no usurious interest included or added into the last note, they will find for the plaintiff."

The defendants' counsel requested the court to charge the jury as follows, to wit:

"First. That if the jury believe that there was ten per cent. interest for four years included in the original note of $12,000, given by Torreys and Hill to S. Shaw, due January 1, 1842; and that before Dr. Grant, the plaintiff, became the purchaser of the note, he had notice that said ten per cent. interest was included in said note, or that ten per cent. interest for any part thereof was so included therein; that then the plaintiff was affected by notice of that fact; and could not recover anything more than the principal of said note, without interest; and that if the jury believe that the note sued on in this action was given in renewal of the said note of $12,000, they will deduct from the same the amount of interest that was included in said original note.

"Second. That if the jury believe from the evidence that the plaintiff had notice before he purchased the $12,000 note from Shaw, of the usurious interest charged in the note, then he is not entitled to recover, notwithstanding one of the makers may have told him he had no offset against it.

"Third. That the defendants are not precluded by any admission made in relation to the existence of offsets against the original note of $12,000, unless the jury is satisfied that the promise was distinct and positive, and that the plaintiff was actually misled by it."

Much of these instructions were overruled by the court. The defendants excepted to the instruction granted at the request of plaintiffs; and to the refusal to charge as requested by defendants.

The jury found for the plaintiff; and the defendants bring up the case by writ of error.

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H. T. Ellett, for plaintiff in error.

1. The statute fixes the rate of interest on contracts founded on the sale of land or chattels, at eight per cent., and prescribes the penalty for taking more. H. & H. 374, § 14.

2. A new security given to the original party who committed the usury, or to a party having notice of it, and without any new consideration, but including the interest of the original transaction, will not purge the usurious consideration, or give a right of action. *Powell* v. *Waters*, 8 Cow. 669, per Jones, Chancellor, 692, per Colden, Senator, 696; *Tuthill* v. *Davis*, 20 Johns. 285; *Cuthbert* v. *Haley*, 8 Term R. (390) 218; 3 Ib. 534; 7 Ib. 184; *Lowe* v. *Waller*, Dougl. 736.

3. A subsequent security for no more than principal and legal interest, deducting all sums reserved usuriously under the former agreement, is binding. *Wickes* v. *Gogerly*, 1 Carr. & Payne, 396; (11 Eng. Com. Law Rep. 434); *Preston* v. *Jackson*, 2 Starkie's R. 237; (3 Eng. Com. Law Rep. 332.)

If the original security comes into the hands of a *bona fide* holder, for a valuable consideration, without notice of the usury, a new security given to such *bona fide* holder will be good. *Cuthbert* v. *Haley*, 8 Term R. 390.

4. But, a person taking a note in payment of a preëxisting debt, is not a *bona fide* holder, and is liable to all equities between the original parties. 6 Yerger, 108; 5 Johns. C. R. 54; 20 Johns. 637; 9 Wend. 172; 14 Peters, 318; 4 S. & M. 254; 4 Paige, 215.

5. This third instruction was pertinent to the case, called for by the facts proved, and was in the very language adopted by this court on a former occasion, to define the law upon this subject. *McMurran* v. *Soria*, 4 How. 154–160. See also *Hamer* v. *Johnston*, 5 How. 698; *Land's Administrator* v. *Lacoste*, Ib. 478.

6. The letter read in evidence, and objected to by defendants, was inadmissible. 2 Stark. Ev. 25.

J. B. Thrasher, for defendant in error.

1. The price agreed to be paid was the price asked on credit;

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it has never been held that an extravagant price on long credit constituted usury. *Planters Bank* v. *Snodgrass*, 4 How. 573; *Van Schaick* v. *Edwards*, 2 Johns. Cases, 369; Chit. Con. 238, n. 1; 7 Barn. & Cress. 453; 1 Mann. & Ryl. 143.

2. Grant was a purchaser without notice; he was informed there was no offset; the admissions of a co-maker of a note are evidence against the others. 3 S. & M. 467; 15 Johns. R. 3; 7 Wend. 445; 3 Pick. 291.

3. No defence can be set up against a *bona fide* holder of a note, who has traded for it on the assurance that there was no defence. 5 How. (Mi.) R. 471, 698.

5. The same rule applies to an illegal consideration. 2 Marsh. 141; 10 Mass. 121.

5. If illegal testimony was admitted, it would not suffice to reverse the judgment. 1 S. & M. 22.

6. The charges refused were hypothetical, and properly rejected. 11 Wheat. 59; *Loring* v. *Willis*, 4 How. (Mi.) R. 386.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This action was brought on a promissory note which was given to Grant for a balance due as the residue of another note, which had been transferred to him by the payee.

One Shaw had sold a plantation and negroes to the Torreys, at an estimated price for the negroes, and also for the land per acre, which amounted in the aggregate to $53,119. The price was to be paid in six instalments, and ten per cent. interest was added to each instalment from the date of the contract, until maturity, it being considered a cash transaction, although no money was paid. Principal and interest amounted to $72,000.

This note was given for a balance on the instalment due in 1842. The original note was $12,000. A payment of $6,000 was first made, and another payment of $4,300, leaving a balance of $1,700, for which this note was given. The defendants set up the usury as a defence, and the questions to be determined arise out of the charges given for the plaintiff, and those asked

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and refused for defendants. It may be sufficient to notice the charges asked and refused.

The first charge refused was in substance this; that if ten per cent. interest for four years was included in the original note for $12,000, and Grant purchased the note with notice of the usury, or that ten per cent. included in any part thereof was so included, he cannot recover more than the principal due, without interest. And if the jury believe the note sued on was given in renewal, they should deduct from the same the amount of interest that was included in the original note.

The second charge refused was, that if the plaintiff had notice, before he purchased the $12,000 note, of the usurious interest included in the note, he is not entitled to recover, although one of the makers may have told him he had no offset against it.

And third, that the defendants were not precluded by any admissions made in relation to offsets against the original note, unless the promise was distinct and positive, and the plaintiff was misled thereby.

The points thus raised may be resolved into two questions.

First, was this a usurious contract; and second, if so, can the defence be made against the plaintiff, who was an assignee with notice.

It has been insisted, that these notes were not usurious, that the price in cash was $53,000, but the price on credit was $72,000. The case cited from 2 Johnson's cases was similar to this, but the judges were equally divided on the question of usury. It is a question of intention. In this case there can be no doubt but what the additional sum was intended as interest. The witness says it was considered as a cash transaction, in order to justify, as the parties supposed, the taking of ten per cent. The slaves were valued and purchased at $1,000 each, and the land at $22.25 per acre, and ten *per cent. per annum* was added as interest, for the time the notes had to run, and not as a part of the purchase-money. The statute provides, that no person shall take, directly or indirectly, for any contract, bond, or note for the payment of money, founded on any bargain, sale, or loan of wares and merchandise, goods and chat-

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tels, lands and tenements, or any use or occupation thereof, more than eight dollars for the forbearance or giving day of payment of $100 for one year, &c. This statute evidently reaches the case, according to the understanding and object of the parties in making the contract. The statute would become a dead letter if it could be thus easily avoided. As the original note was affected by usury, every renewal or change of security must be equally affected. Chitty on Contracts, 237.

In the next place, is this defence available as against the plaintiff. The proof is positive, that he had notice of the usury before he took a transfer of the note. He is not, therefore, an innocent holder. Various letters passed between some of the makers of the note and the plaintiff below. One contained an admission that there was no offset. And subsequent to the purchase, by another letter, terms of payment were proposed. And on this ground an effort is made to get rid of the illegal consideration. The principle is a familiar one, that when the maker of a note induces a third person to purchase it, he thereby waives his defence; otherwise it would be a deception on the purchaser. But in this class of cases, it will be found that the indorsee is an innocent person, and took the transfer on the strength of assurances made by the maker, without notice of any illegality in the consideration. Not so in this case. Grant took the note, knowing that it was in part founded on an illegal consideration. He was not deceived in the purchase. The case differs also from one in which a mere failure of consideration has occurred. The maker may waive such failure. This was an illegal consideration, a consideration prohibited by law. No waiver of this defence is binding as to a party who has notice.

In the case of *Lomax* v. *Picot*, 2 Randolph, 247, it is true the maker of a note was held bound to an indorsee who had taken the transfer on the assurances of the maker; although the indorsee knew what the consideration was, yet he did not know that the consideration had failed. Here the indorsee knew the consideration to have been usurious and therefore illegal. The defence in the case of *Chadbourn* v. *Watts*, 10 Mass. R. 121,

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was usury, and the maker was held liable to an indorsee; but the indorsee was ignorant of the usury.

From these remarks, it will be perceived the court erred. The plaintiff was not entitled to recover anything more than the principal, without interest; the question was fully embraced by the charges asked. If any part of this note is for the principal, the plaintiff is entitled to recover to that amount, but not beyond it.

Judgment reversed and cause remanded.

SAMUEL SEMPLE ET AL. *vs.* ANTHONY MCGATAGAN ET AL.

Where there was a complete defence at law, which by the use of ordinary diligence and precaution might have there been made available, the court of chancery will not interfere to grant relief.

Where, therefore, the defendants in a judgment at law, sought relief in equity against the judgment, on the ground that it was based on a contract with the plaintiff to pay him the sum sued for, for his services as teacher, with the understanding, that what he received from day scholars was to be deducted from the amount they were to pay; and that they had not been able until after the judgment at law to find the list of scholars who had paid, but they had since found it, and the sum received on it, *exceeded* the debt they were to pay; it was *held*, that they were not entitled to any relief against the judgment.

A decree dismissing a bill which shows no ground of relief, is not erroneous, though it be rendered before the principal defendant has answered, or any steps taken against him.

APPEAL from the vice-chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

The facts are sufficiently stated in the opinion of the court.

H. W. Brown, for appellant.

Brooke, for appellee.

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Mr. Justice THACHER delivered the opinion of the court.

In the district chancery court, Semple and others filed their bill, charging that McGatagan, for the use of Wren, recovered a judgment at law against them, upon their agreement to secure McGatagan the sum of $800, for his services as a teacher of youth for the term of one year, which judgment they afterwards merged in a judgment upon their forthcoming bond in the same case; and further charging that their agreement was given upon the condition that McGatagan, should use diligence to collect the amount of money, secured by a subscription list for the purpose, and credit it with tuition-money, received from certain day scholars, and charging that they were unable to procure said list until after the rendition of the judgment upon the forthcoming bond, and which they allege shows a payment of more than the amount of the judgment procured against them. Upon the allowance of a demurrer in the district chancery court, an appeal was taken to the superior court of chancery, when that decree was reversed. Subsequently, the complainants received a decree in the district chancery court upon the bill, and the answer of Wren, dissolving the injunction of the judgment at law, and dismissing the bill.

The facts show, that there was a complete defence at law in this case, and that by the use of ordinary diligence and precaution, that defence could have been made available upon the trial of the suit founded upon the agreement. The rule is imperative, that relief in chancery will be refused in such a state of case.

The complainant allowed the decree to be taken, while no answer or *pro confesso* had been taken against McGatagan. But if McGatagan had answered, confessing the allegations of the bill, the result must have been the same, because the bill does not present a case demanding the relief.

Decree affirmed.

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DANIEL ABBOTT, Administrator of James Sparke, *vs.* WILLIAM MCELROY.

If a debt is due, and the statute of limitations has commenced running, before the death of the debtor, it is not suspended by his death, until administration is taken out upon his estate; but if the debt was not due at the time of his death, the statute does not begin to run until there is administration, because, until then, a cause of action has never accrued.

The statute of limitations is suspended during the first nine months after administration granted, because in that period, no suit can be maintained against the administrator.

IN error from the circuit court of Adams county; Hon. Thomas A. Willis, judge.

William McElroy sued the administrator of James Sparke, for work and labor. The pleadings were in the common form; the issue *non assumpsit.* There were two trials had.

On the second trial, the court, at the instance of the plaintiff, instructed the jury as follows, viz.:

"If the jury believe, from the evidence, that the plaintiff was not of age six years before the death of Sparke, he was not barred of his action during Sparke's lifetime; and the time that there was no executor or administrator, is not to be estimated as part of the time to be computed in determining whether the statute of limitations of six years had elapsed before suit was brought. Nine months from the date of the grant of letters of administration, is also to be deducted. And if the jury believe from the evidence, that six years had not elapsed from the time McElroy became of age, after deducting the time from the death of Sparke, until nine months after the grant of administration to Bell, the plaintiff's claim is not barred by the statute; and if the demand is otherwise proved, the plaintiff is entitled to recover."

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The jury found for the plaintiff, and the defendant prosecuted this writ of error.

G. and *J. Winchester*, for plaintiff in error,

Stated the point in issue, and cited *McCoy* v. *Nichols*, 4 How. (Mi.) Rep. 31; Angell on Lim. 57; Ib. 532; 3 Stew. Rep. 172; 2 Bibb, 537; Harper, 135; 13 Wend. 267; 2 Port. 44; 1 Cow. 356; How. and Hutch. Dig. 570.

Montgomery and *Boyd*, for defendant in error,

Relied on How. and Hutch. 569, $ 91; 14 Con. Eng. Ch. Rep. 213; *Dowell* v. *Webber*, 2 S. & M. 452; 12 Wheat. 129; 2 Hayw. 147; 2 Ib. 180; 7 Eng. Com. Law. Rep. 70.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The only question in this case arises out of a charge given to the jury at the request of the counsel for the plaintiff below. That charge raises this question: Does the statute of limitations cease to run, after the death of the debtor, until an administrator is appointed, and for nine months thereafter, the administrator being exempt from suit during that time?

That the act of limitations does not run during the nine months allowed by statute to administrators, before they can be sued, was expressly decided in the case of *Dowell* v. *Webber*, 2 S. & M. 452. In that case, the court also remarked, that the statute of limitations does not run when there is no executor or administrator. The remark was no doubt predicated on a similar one made by Judge Catron, in *Bradford* v. *McLemore*, 3 Yerger, 318. In one sense, this is true; but it seems to have been understood by counsel with too much latitude. The precise point was not then before the court, nor was it intended to be decided. The principle is, that when the statute of limitations has begun to run, it continues to do so. In the application of this principle, the current of authorities hold, that its operation is not suspended by the death of the debtor, until administration be taken out. The statute contains no such exception, and it cannot be so construed. The time al-

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lowed by the statute, within which an administrator cannot be sued, has always been held to constitute an exception, because the statutes are construed together. The law cannot be supposed to be so inconsistent as to prohibit, and at the same time, permit a bar to run. But when it is said that the operation of the statute is not suspended between the death of the debtor and administration taken, it must be understood with this qualification. If the debt was due, and the statute had commenced running before the death of the debtor, it is not suspended. But if the debt was not due at the time of his death, the statute does not begin to run until there is an administrator, because, until then, a cause of action has never accrued, there being no one who could be sued. The case cited from 7 Eng. Com. Law Reports, is founded on this distinction. The money was not due until after the death of the intestate. This distinction is also very clearly taken in the case cited from 13 Wendell, and in 3 Stewart's Rep. 532. See Angell on Limitations, 57, 2d. ed.; Id. 532. The rule is differently stated in Bacon's Abridgment, but it was extracted from the case of *Carey* v. *Stephenson*, which holds a different doctrine, and was probably mistaken. The court was right, then, in deciding that nine months after administration were to be excluded, but wrong in deciding that the time which elapsed between the death of the intestate, and the time of taking out administration, was also to be excluded. The statute had commenced to run, long before the death of the intestate, and was not thereby suspended.

Judgment reversed, and cause remanded.

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Daniel Vertner *vs.* William H. Martin, Administrator of Mary A. Lacy, deceased.

It is an unusual mode of practice to permit a party charged with a contempt to put in a plea by attorney, without an appearance in person; the regular mode is for him to answer interrogatories upon oath, so as to clear himself of the contempt.

It is no bar to a proceeding in the probate court for an attachment against an administrator for a contempt, in failing to pay a sum of money which he had been previously decreed to pay, that a former citation had issued for the same subject-matter upon the petition of the same party, and that on the hearing thereof the same had been dismissed by the court.

Where, therefore, in a proceeding for such attachment, such a former citation was plead in bar, it was *held*, that the defence being unavailablo, a peremptory attachment was properly ordered.

The issuance of citation in the probate court to an administrator, on a judgment of the court, ordering him to pay money, is only process intended to carry into effect the judgment of the court; and the quashing or dismissal of final process does not affect the judgment from which it emanates.

The act of 1846 (sheet acts, p. 144,) which provides for the issuance of attachments to enforce the decrees of the probate court, introduces no new remedy in that particular; such a power has long belonged to that court.

It seems that the power given by that act (of 1846) to the probate court, in some cases to issue a *fieri facias*, is a new remedy.

In error from the probate court of Claiborne county; Hon. William M. Randolph, judge.

William H. Martin, administrator of Mary A. Lacy, filed in the probate court the affidavit of W. S. Wilson, stating that Wilson, in pursuance of a letter of attorney from Martin, showed Daniel Vertner, executor of Peter A. Vandorn, a copy of a decree of the probate court, showing the sum of three hundred and fifty dollars to be due from Vertner, as executor of Vandorn, to the legal representatives of Mary A. Lacy, as her distributive share of her father's estate, and on behalf of Martin, as

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administrator of Mary A. Lacy, demanded payment from Vertner; that Vertner refused to pay it, alleging that he owed no part of said sum, but that he had, as executor of Vandorn, paid to said Mary before her death, all she was entitled to receive from his estate.

To this affidavit was annexed the letter of attorney from Martin, and also a copy of a decree of the court, made August 22, 1842, on the final settlement of Vertner's account as executor of Vandorn, on a bill filed for that purpose by Earl and Aaron Vandorn, two of the distributees.

The decree directs the payment of three hundred and fifty dollars each to Jane Vertner, Octavia Sulivane, and the legal representatives of Mary A. Lacy, deceased, and to make an equal division of the residue between Earl, Aaron and Emily Vandorn.

On the filing of the above papers, an order was made by the court on the 25th March, 1845, and a citation issued thereon, requiring Vertner to show cause at the next term, why an attachment should not issue against him for failing to pay the said money to Martin, as administrator.

At the April term, 1845, Vertner filed a plea to this citation, which denies his liability to answer it, because (it says) on the 26th December, 1843, Martin, as administrator as aforesaid, filed his petition in said court, for a rule upon him to show cause why payment of the said sum of three hundred and fifty dollars should not be made to him. That a citation was issued thereon, and on the 26th of March, 1844, he filed his demurrer and answer to said petition, insisting on his demurrer, and setting up in his answer among other things, that he had overpaid to Mary A. Lacy, in her lifetime, her share of the estate of Peter A. Vandorn, and that the estate of said Mary A. Lacy was largely indebted to him, after deducting said sum of three hundred and fifty dollars. And that such proceedings were thereupon had, that at the March term, 1844, of said probate court, on motion of said Vertner, and upon his answer, the said citation was dismissed; that said petition, citation and proceedings were founded on the very same subject-matter, concern-

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ing which the citation to the then present term was sued out; that the dismissal of said first citation and proceedings remains in full force and unreversed, and the same is pleaded in bar of the present proceedings.

To this plea, Martin filed a demurrer at the May term, 1845, assigning for causes; 1, that Vertner being shown to be in contempt of the court and its decree, ought to have appeared in proper person, to purge himself of the charge; and 2, because the petition of Martin was not dismissed, but only the citation; and because the court is not concluded by the first decision, from granting process upon a better and different showing.

At the May term, 1845, the court being of opinion that Vertner had failed to show sufficient cause why an attachment should not issue against him, ordered, "that an attachment issue, returnable to the next regular term of this court, against the said Daniel Vertner, executor as aforesaid, directed to the sheriff of Claiborne county, commanding him to attach the body of the said Daniel Vertner, and keep him in custody until he shall perform and fulfil all and singular the matters and things required of him, in and by the said decree commanding him to pay the said sum of three hundred and fifty dollars, to the legal representatives of Mary A. Lacy, deceased, or until further order shall be made in the premises by this court."

To reverse this decree, the present writ of error is prosecuted.

H. T. Ellett, for plaintiff in error.

1. A writ of error will lie in this case; the judgment being a final adjudication that the plaintiff in error is in contempt, and that he be committed to custody until he perform the former decree of the court. *McCredie* v. *Senior*, 4 Paige, 378.

2. The affidavit, letter of attorney, and copy of the former decree, which were laid before the court below, as the foundation of the rule to show cause, are properly parts of this record. It is the petition of the party. It is the showing to which the defendant's plea applied. The plea was demurred to, and the demurrer sustained. No bill of exceptions could be

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taken. The statute in such cases requires the papers filed in court to be copied in the record. H. & H. 473, sec. 20.

3. The order of the court below is erroneous.

1st. Because the former decree sought to be enforced, was in favor of the "legal representatives" of Mary A. Lacy; and Martin, on whose application the attachment was ordered, is the "personal representative;" the term "legal representatives" is technical, meaning heirs, and is used in contradistinction to the "personal representatives," who are the executors or administrators. 2 Tidd, 1118.

2d. The plea presented a good bar to the attachment. The former proceedings were of the same character, and had precisely the same object, and the court below dismissed them. "*Nemo bis vexari debet pro eadem causa.*" The court was right in thus dismissing them, because the answer showed that the money had been advanced to Mrs. Lacy in her lifetime, before the decree of distribution. The decree only ascertained the amount of the estate to which each legatee was entitled on distribution. It did not, nor could it, settle any questions as to payments made by the executor to each legatee before the decree. It is discretionary with the court whether to enforce the decree by attachment, and in this case the court properly left the parties to their remedy at law.

3d. That the probate court does not possess the power to enforce all its decrees by attachment. Special power is conferred in certain cases, and this excludes the idea of a general power in all cases. But if it possesses the power, it was error to order the defendant to be committed until he performed the decree, on a mere hearing of a rule to show cause why an attachment should not issue. The order ought to have been for an attachment to bring in the party to answer the contempt, upon which he is entitled to be heard. Here he had no opportunity to defend himself. 1 Tomlin's Law Dic. Attach. 144; Stacy's Case, 10 Johns. 328; Vanderbilt's Case, 4 Johns. Ch. R. 58; 1 Hoffman's Chan. Practice, 432–441; *McCredie* v. *Senior*, 4 Paige, 378.

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W. S. Wilson, for defendant in error.

1. The writ of error will not lie; the judgment is not final. *Regan* v. *Stone*, 4 S. & M. 691.

2. There was no bill of exceptions; nothing to show on what the court below acted; nothing to bring before this court the papers and evidence on which the judge decided; consequently, unless the judgment be erroneous on its face, it must stand.

3. Vertner's plea sets up that he paid Mrs. Lacy in her lifetime the sum claimed; the answer to this is, the decree concludes him from such defence; it orders payment to the representatives.

4. The petition of Martin is not alleged to have been dismissed; only his citation; the latter may have been dismissed for irregularity in the process; that could not affect the validity of the decree; the first citation having failed to enforce the decree, the second is resorted to for that end.

5. The probate court decreed Vertner to pay the three hundred and fifty dollars; he has not done so, that decree is still in full force. Has he shown any valid reason for escaping it? If not, the decree should stand.

Mr. Justice CLAYTON delivered the opinion of the court.

In March, 1845, a citation was issued from the probate court of Claiborne county, upon the application of W. H. Martin, administrator *de bonis non* of Mary A. Lacy, deceased, directing D. Vertner to appear at the next term of the court, to show cause why an attachment should not issue against him, for a contempt in failing to pay a sum of money, which he had been previously decreed to pay to the legal representatives of said Mary A. Lacy.

In obedience to the citation, Vertner appeared by attorney and pleaded, that a former citation had issued for the same subject-matter, upon the petition of the plaintiff, and that on the hearing thereof, the same had been dismissed by the court, and he pleaded the same in bar of this proceeding.

It is an unusual mode of practice, to permit a party charged with a contempt to put in a plea by attorney, without an ap-

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pearance in person; the regular mode is for him to answer interrogatories upon oath, so as to clear himself of the contempt. Tom. Law Dic. tit. Att.; 1 Smith's Ch. Prac. 168.

The court, however, in this instance, acted upon the plea, the party having demurred to it, and directed a peremptory attachment to issue against the defendant. The dismissing the first citation, as stated in the plea, was no bar to a second for the same cause. It was only process intended to carry into effect the judgment of the probate court; and the quashing or the dismissing of final process, does not affect the judgment from which it emanates.

This showing, therefore, made by the plea, was not a sufficient answer, and the party was entitled to the attachment. In *McCredie* v. *Senior*, 4 Paige, 381, the court say, "if the contempt be admitted, or no cause shown against it, the court proceeds to award the punishment."

In this case there having been no sufficient cause shown, it was right to award the peremptory attachment.

The act of 1846, p. 145, recognizes this as the proper practice; though we do not regard that act as introductive of a new remedy in this particular. That an attachment is an appropriate remedy in the probate court, was settled at an early day. Walk. Rep. 310. The *fieri facias* given by that act, is perhaps a new remedy.

The judgment is affirmed.

BENJAMIN WILLIAMS *vs.* SARAH JONES.

Where the maker of a promissory note has a good defence at law, such as failure of consideration or payment, and fails to avail himself of it there, he cannot afterwards come into a court of equity for relief, without showing substantial reasons for not having made the defence at law.

Therefore, where W. being sued at law on a note in favor of J., payable at a particular time, allowed judgment to go against him at law, and subsequently filed a bill in equity against J., alleging that the note was given for a tract

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of land bought of J.; which tract had been appraised for the purpose of procuring stock in the Mississippi Union Bank, and that the terms of the contract of sale were, that the purchase-money was to be paid to W. out of the proceeds of the certificates of stock when discounted and in Union Bank money; and W. exhibited with his bill a contract to that effect between himself and J.; it was *held*, that W. had a complete defence which he should have made at law; J. having denied the contract of sale in her answer, as set up by W. and sworn that she had been deceived and imposed on by W. in the execution of said contract, as no such conditions were read to her in the contract, and her answer being sustained by the proof; it was *held*, further, that the chancery court could have properly rendered no other decree than the dismissal of W's. bill.

In an action on a note given for land, where a bond for title has been given by the payee of the note, it is competent to introduce the bond in evidence to explain the note.

APPEAL from the vice-chancery court, at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Benjamin Williams alleges in his bill, that in the year 1839 he purchased of Sarah Jones a certain tract of land, which had been appraised for the purpose of taking stock in the Mississippi Union Bank, and the stock had been subscribed for; that Sarah Jones sold him the land and transferred him the stock, for which he was to pay her sixteen hundred dollars in the notes of the Mississippi Union Bank, which sum was not to be paid until the stock was declared, and until the stockholders drew the amount allowed on stock, as provided in the charter of said bank; and that she gave her bond to make title to the land and transfer the stock, in the penalty of four thousand dollars. This bond he exhibited with his bill; it recites the contract of sale substantially as stated in the bill.

He further states, that when he made this contract he executed his note for the sixteen hundred dollars, payable on the first day of January, 1840, the bond having been made and the note dated the 29th of April, 1839; that the note was in the ordinary form of a promissory note, was drawn by a lawyer of eminence, who assured him it was all right to draw it in that form.

That on the 23d of September, 1839, at the request of said

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Jones, he paid the sheriff of the county the sum of five hundred and seventy-two dollars and twenty-seven and a half cents to be credited on this note; and on the 4th of March, 1840, he paid her one hundred dollars more; and for these sums he exhibited receipts with his bill, and when the note matured he tendered to Jones the full amount in notes of the bank, which were refused, and Jones sued him at law on the note, and recovered judgment for $1416.05 on the 15th of November, 1843; that he set out this defence by plea in the court of law, but his plea was demurred to, the demurrer sustained, and he was advised that in equity was his only relief.

That Jones had no property sufficient to compensate him in damages; that she had not made title to the land; and had not and could not transfer the stock, because no stock was ever perfected in the bank.

The bond exhibited with the bill was signed "Sarah $\underset{\text{mark.}}{\overset{\text{her}}{\times}}$ Jones," and tested by "A. R. Herron and Stephen Hartgrove."

Sarah Jones answered the bill, stating that she could not read, and did not therefore know whether the bond exhibited with the bill was the one she signed or not; she believes it was not, as there was no provision in the bond she signed that the money was not to be paid until the stock was taken and allowed in the bank; nor was there any provision that the note was to be paid in the notes of the Mississippi Union Bank, and if the bond exhibited with the bill *was* the one she signed, the complainant had fraudulently taken advantage of her inability to read, to insert such provisions in the bond, not in their contract, and never ratified by her.

A. R. Herron testified that his recollection was very indistinct with reference to the matter; but according to the best of his recollection such an agreement as the one set forth in the bond was signed by Sarah Jones, and he believes that to be the agreement which she signed, and he thinks it was read to her before she signed it; the papers were signed in his office, but the contract of purchase was made before they came there.

Stephen Hartgrove proved that he was present when the

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contract of sale was concluded between Williams and Mrs. Jones; that not a word was said about Union money or the stock in the Union Bank; it was a sale of the land for sixteen hundred dollars, every dollar of which Williams said he would pay before maturity; Williams, on the day the bond and note were signed, did not read over the bond to Mrs. Jones; previously Williams had read to Mrs. Jones, at her house, a bond for title in the ordinary form to the land which he had been called on to hear, as Mrs. Jones could not read, and nothing was then said in the bond about Union money or stock in the bank; the witness was present during all their negotiations, and never heard a word on the subject; and the day the bond was signed and witnessed it was read over by none of the parties; it was handed by Williams to Mr. Herron, the lawyer, who read it over and said it was a valid bond, upon which Mrs. Jones signed it, and the witness and Herron attested it; Williams then executed the note which Herron wrote, without demur or hesitation, and never once pretended it was payable in Union Bank money.

This was the substance of his deposition. The vice-chancellor dismissed the bill, and Williams appealed.

William and *William G. Thompson*, for appellant, contended that defendant admits that she has not conveyed the land to complainant, nor transferred the stock to him. There is no proof that complainant took possession of the land. We contend that here was a failure of consideration, and that defendant should refund to complainant the amount admitted in the answer to have been paid by him before judgment recovered on the note.

Acee, for appellant, insisted,

1. That by the contract of Williams he was to pay the money at a particular day, and that day had passed, and he showed no reason why he should be excused from the performance of his contract. He cited *Shubrick* v. *Salmond*, 3 Burr. 1637; 8 T. R. 267; Aleyn's R. 27; *Parker* v. *Hodgson*, M. & S. 267.

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2. If the appellant had any remedy, it was at law, and he should have made his defence in the circuit court. *Nevitt* v. *Gillespie*, 1 How. R. 108; *Thomas* v. *Phillips*, 4 S. & M. 358; *Houston* v. *Royston*, 1 S. & M. 238.

3. The appellant asks that the contract for the sale of land should be rescinded. To enable a party to have a contract rescinded, he must make out a clear and undoubted case. *Ayres* v. *Mitchell*, 3 S. & M. 683; *Stockton* v. *George*, 7 How. R. 172.

4. When contracts of doubtful import are susceptible of a legal interpretation by which they can be enforced, such interpretation must prevail. *Riley's Adm'rs.* v. *Vanhouten*, 4 How. R. 428.

Mr. Justice THACHER delivered the opinion of the court.

Williams filed his bill in the district chancery court. He charged, that in 1839 he contracted with Sarah Jones for the purchase of a tract of land, which had been appraised for the purpose of procuring stock in the Mississippi Union Bank. He charged, that the terms of the contract were, that Jones was to transfer to him the stock procured upon the land, and the purchase-money to be paid in the bills of the Union Bank, and not until the bank had discounted money upon the stock certificate. Williams gave his promissory note for the purchase-money, payable at a particular time, and not specifying that it was payable in any particular funds. He exhibited a bond purporting to have been executed by Jones, at the time of the contract, which, in its conditions, sets out the terms of the contract as alleged by Williams. The answer of the defendant denies that the payment of the purchase-money was to have been made in the bills of the Union Bank, and charges that as to the bond an imposition was practised upon her from her ignorance in not being able to read or write, and that no such conditions were contained in the bond read to and executed by her at the time of the contract. Suit was instituted upon the promissory note, and judgment recovered at law.

The statement, on the part of Williams, of the character of the contract, shows that a perfect defence could have been

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made at law in the action on the promissory note, both as to the failure of its consideration, and the payments claimed to have been made upon it. It was competent to have introduced the bond to explain the note, it having been executed at the time the note was made, and constituting a part of the evidence of the contract. The payments, if made and well pleaded, formed a further defence. A successful defence to the whole note would have worked a virtual rescission of the contract.

But as the proceedings stand in the chancery court, no other decree could have well been made. The only witness who speaks confidently in giving his testimony is Stephen Hartgrove. He was present during the making of the contract, and he confirms the answer of the defendant in all material parts.

Decree affirmed.

ALEXANDER C. BAINE *vs.* ROBERT WILLIAMS.

The surety on a forthcoming bond, becomes liable by signing and forfeiting the bond; the re-delivery of the property is the consideration; and he cannot go into equity, apart from his principal, to re-investigate the original judgment.

Therefore, where a judgment was rendered against A. & M., upon which execution issued and was levied on personal property; and B. joined with them as their surety in a forthcoming bond, which was forfeited; it was held, that B. could not seek relief in equity, in his own name, on the ground that the original judgment was founded on an usurious consideration.

A debtor, who owes his creditor two distinct demands, has a right, in making a payment, to direct its application; if the debtor make no direction, a court of equity will place the credit where it would be most beneficial to the defendant, on the presumption that it was so desired by him; but if there be any direction that it shall be otherwise placed, or if the defendant waive his right to direct the appropriation, a court of equity will not disturb it.

Whether, where a forthcoming bond has been given and forfeited, a court of equity has jurisdiction to go behind the judgment of forfeiture, and in-

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quire into the validity of the levy of the execution on which the bond was given, — *Query?*

Where a surety sought to be relieved from a forfeited forthcoming bond, on the ground that there had been no levy; and it was proved, that the sheriff came into the defendant's store with the execution, and that he supposed both parties considered that a levy was there made on the goods; it was held, the proof was entirely too vague to constitute the foundation of a decree, even if equity had jurisdiction.

It seems, where there is a judgment against a party, and he purchases real estate on a credit, and subsequently gives a deed of trust thereon, to secure the payment of the purchase-money, that the lien of the judgment will be paramount to the vendor's lien or that of the deed of trust; and the real estate thus purchased, will be liable to sale under the judgment.

A subsequent purchaser has a right in equity to require an execution creditor to exhaust the unsold property of his debtor, before he resorts to that which has been sold; so, also, it seems, that one holding an incumbrance on property junior in date to a judgment lien, can force the judgment creditor to exhaust the other property of his debtor before he can sell the incumbered estate; but if the junior incumbrancer permit a sale to take place of the property on which he has a lien, under execution on the judgment, his remedy is at an end; for though the sale might have been *prevented*, it does not follow that it will be set aside.

A surety has a right, under the statutes of this State, to require the plaintiff in execution to make the money out of the principal.

An execution having been levied on certain lands, a junior incumbrancer filed his bill, to compel the judgment creditor to levy on other property of the judgment debtor; the chancellor decided against his right to do so, and he prayed and appealed; but before prosecuting his appeal, the property was sold under the execution; he moved this court to have the sale set aside; *held*, that although he was entitled to the relief originally prayed for, yet, as by his neglect in prosecuting his appeal, he had permitted the sale to take place, it was too late to afford him relief, and the sale could not be set aside.

APPEAL from the vice-chancery court, held at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Alexander C. Baine states in his bill, that, on the 24th of September, 1837, Robert Williams recovered judgment against William Armour, Henry Lake, and George K. Morton, for $4,503.50; upon which a forthcoming bond was given with complainant, George W. Lake and Thomas J. N. Bridges (the two last afterwards admitted as complainants) as sureties; and

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was forfeited on the 9th of September, 1839. This judgment bore ten per cent. interest.

On the 12th of March, 1839, Williams obtained a judgment against the same defendants, Armour, Lake, and Morton, for $4,410.10, on which a forthcoming bond was forfeited on the 4th of May, 1840, with William Lake as surety; the penalty of the bond being in the sum of $950.97; the residue of the judgment being satisfied. This judgment bore eight per cent. interest.

That portion of these judgments were founded on usurious contracts. That Morton had paid Williams twelve hundred dollars, which Williams had credited on the latter judgment, in fraud of complainant's rights, and in violation of Morton's instructions, and without complainant's knowledge.

That, on the 13th of July, 1838, sold to Morton part of lots 75 and 76, in the town of Grenada, and took Morton's note for the purchase-money, without security; that, in October, 1842, to avoid the expense of a suit in chancery, Morton gave him a deed of trust, to enable him to enforce his vendor's lien; the judgment of Williams formed a cloud on his right to enforce his deed of trust; that the other parties defendant to the judgment, Armour, Lake, and Morton, had ample property to pay off and satisfy both of the judgments of Williams, in real estate in the town of Grenada.

He prays for an injunction against the sale of the lots under Williams's execution, and that it may be made perpetual; that he may be released and discharged from liability on the bond, and for general relief; for leave to examine Morton, as to the usury, &c. Williams and Armour, Lake and Morton, are made defendants to the bill; but process was only served on Williams and Lake.

An amended bill sets up that no levy was ever made on the execution under which the forthcoming bond was taken; no seizure of goods was made at all; Morton, one of the defendants, wrote in the bond the levy on his goods, and handed the bond back to the sheriff, and no other levy was made. The bill was filed May 27, 1844.

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The answer of Williams denies the usury; and states that the $1200 was placed as a credit on the judgment bearing eight per cent. interest, by Morton's direction; he admits that the other defendants to the judgments have property out, whether sufficient to pay the debt, he has no means of knowing, and denies complainant's right to the relief he asks.

The testimony of Morton was taken, as to the usury and the payment of the $1200, and the appropriation of it. It is not deemed requisite to set it out, as the court refused to inquire into the question of usury; and held the appropriation of the $1200 to have been directed by Morton to the judgment bearing eight per cent. interest. Morton proved also that the sheriff came into his store with the execution, on which the bond was given; when the levy was written in the bond; he and the sheriff both regarded it as a levy; there was no intention to deceive or defraud any one by it. The cause was referred to a commissioner, who reported that $2,020.37 was due by Baine and the others on the judgment.

At the June term, 1845, of the vice-chancery court, the vice-chancellor dismissed the bill, and on the 20th of December, 1845, Baine appealed, and prosecuted his appeal on the 1st of March, 1846.

At the January term, 1847, of this court, Baine moved the court to set aside the sale of the lots on which he claimed a lien, which had been made under execution on the judgment in favor of Williams, on the 4th day of May, 1846; and the cause was submitted on the motion, and also for final decision, on the whole record.

E. S. Fisher, for appellant, insisted,

1. That it was alleged and proved, that Armour, Lake, and Morton, had ample other property to satisfy the debt which should have been first sold.

2. That it was alleged and proved, that the judgments were based on usurious considerations.

3. That there had been no valid levy on the goods, and the bond was void. *Long* v. *Bank of United States*, Freeman's Ch. Rep. 381.

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4. The credit of $1200 was fraudulently placed on the smaller judgment.

5. The vendor's lien was in full force, and was paramount to the judgment, and should have been enforced.

6. The sale in May, 1846, since the date of the appeal, should be set aside; the appeal suspends the decree. 4 S. & M. 681.

William and *William G. Thompson*, for appellees, contended,

1. That a surety could not maintain a bill for relief against the debt of his principal, without making his principal a party by service of process. Edwards on Parties in Ch. 99–102.

2. The credit of $1200 was properly placed on the smaller judgment, as it was assented to by Morton, and approved by him.

3. There was no sufficient proof that the other defendents to the judgment had property sufficient for its satisfaction.

4. Morton was an incompetent witness.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The appellant filed his bill in the vice-chancery court, to enjoin the sale under execution of two lots in the town of Grenada, and for general relief. He was not a party to the original judgment, but had become liable on a forthcoming bond. The vice-chancellor decreed against the complainant, and he appealed. The judgment was in favor of Williams, and against Armour, Lake, and Morton.

The first ground on which relief is sought, is, that the judgment was founded on a usurious consideration. This defence should have been made at law, by Armour, Lake, and Morton. They are defendants, instead of being plaintiffs, in this bill. The surety in a forthcoming bond becomes liable by signing and forfeiting the bond; the re-delivery of the property is the consideration, and he cannot go into equity, apart from his principal, to re-investigate the original judgment.

The same plaintiff had recovered two judgments against the same defendants, in both of which forthcoming bonds had been given, with different sureties. Complainant insists that a credit

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or payment of $1200 should have been placed on the judgment on which he was liable, because it was bearing ten per cent. interest; whereas the other was drawing eight per cent. The debtor, in making payment, has a right to direct its application, but no direction was given. Williams asked Morton on which judgment the payment should be credited, but he would give no direction. Morton was examined as a witness, and stated that Williams expressed a desire to place the credit on the judgment bearing ten per cent. It would seem that several conversations were held on this subject. If there was no proof on the subject, equity would place the credit where it would be most beneficial to the defendant, on the presumption that it was so desired by him. The facts developed in this case, tend to show that Morton did direct that the credit should be placed on the judgment drawing eight per cent. They certainly amount to a waiver of his right to give direction.

It is also objected against the validity of the bond, that no actual levy was made before it was taken. Morton says, the officer came into his store with the execution, and he supposes both parties considered that a levy was made on his stock of goods. The proof on this subject is entirely too vague to constitute the foundation of a decree, even if it be a proper subject of equity jurisdiction.*

In the last place, the complainant claims the right to restrain the sale of the two lots mentioned. The lots were purchased by Morton, from the complainant, after the rendition of the judgments. He gave no other security for the purchase-money, but his note, a greater part of which still remains unpaid. To avoid the necessity of resorting to a court of chancery, to enforce the vendor's lien, Morton gave a deed of trust on the lots, for the benefit of complainant. This was in 1842; the lots

* See the case of *Laughlin* v. *Ferguson*, 6 Dana's Rep. 112, where the power of a court of chancery, to relieve surety on a forthcoming bond, when there had been no levy, or an illegal one, is considered; and it is held, that, in such case, equity has *no jurisdiction;* the defence being complete at law, in a motion *to quash the bond.* See also on the same point, *Hagan* v. *Tobin*, 5 Dana, 264; *Saddler* v. *Glover*, 5 Dana, 551; *Lusk* v. *Ramsay*, 3 Munf. 417.

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having been originally sold in 1838. It is claimed, that these lots should be exempted from sale, because Armour, Lake, and Morton have an abundance of property to satisfy the executions, without the lots. The plaintiff had a vendor's lien on the lots, and also a deed of trust. A subsequent purchaser has a right in equity to require an execution creditor to exhaust the unsold property of his debtor, before he resorts to that which has been sold. *Clowes* v. *Dickenson*, 5 Johnson's Ch. Rep. 235.

To this position, it is answered, that the judgment is a lien on complainant's property, as well as on Morton's. His being a surety in the bond, cannot change the rule, because, as such, he has a right to require the plaintiff in execution to make the money out of the principal. H. & H. Dig. 641. Besides, he had not such an interest in these lots as was subject to a levy. And having the right to compel the plaintiff in execution to go against the principal first, he may also protect property on which he has a lien.

It appears, from a motion made in this case, that after the decree in the court below, but prior to the appeal, the lots were sold under execution. If so, the complainant's remedy is at an end; for, although the sale might have been prevented, it does not follow that it will be set aside. The property was liable, and, as the complainant did not take the proper steps to prevent the sale, by prosecuting his appeal, he must abide by the consequences. Nor can the court award indemnity, as was done in *Clowes* v. *Dickenson*. There the purchaser, under junior judgments, was seeking to enforce an older one against an intermediate purchaser, when in equity the property he had purchased was first liable. The complainant is entitled to his costs, and the decree is therefore reversed; but the motion to set aside the sale must be dismissed.

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William T. Lewis et al. *vs.* Theodore O. Starke.

As a general rule, a mere change in the form of the evidence of indebtedness, will not operate to discharge a lien given to secure the debt, unless it is apparent that the parties intended to extinguish the lien; while the *debt* exists the lien lasts.

A prior equity generally sinks or merges in a subsequently acquired legal title, unless there be some declared intent to prevent it or some beneficial purpose to the holder, not inconsistent with the rights of others; a court of equity will keep alive an incumbrance, or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party; so the purpose be innocent and injurious to no one.

S. accepted certain bills of exchange for M., and took a deed of trust on the slaves of M. for his indemnity; the first of these bills S. paid, but instead of enforcing the deed of trust as he might have done, he took of M. a note for the amount, payable to himself, and indorsed it to a bank, which was still the holder of it. *Held*, that S. could not subject the slaves to the payment of this note; by taking M.'s note he either extinguished the lien of the deed of trust, or, if not, he transferred that lien with the note to the bank, in whom, if anybody, the right rested to enforce the lien.

An indorser of a note, who has received indemnity against the indorsement by deed of trust from the maker, cannot proceed to subject the property conveyed, to the payment of the debt, until he has paid the note and taken a reassignment of it.

Where a deed of trust is given by the maker of a note to indemnify his accommodation indorser from loss by reason thereof, the holder of the note thus secured cannot enforce the deed of trust directly; he can only do so by a bill in chancery to have the benefit of the deed in his behalf; and if he do not choose to file such bill, a court of chancery will not force it on him.

M. gave S. a deed of trust on slaves to indemnify S. for certain accommodation acceptances for M. held by B.; B. being in debt to the Merchants Bank, M. by arrangement with B. executed his five notes to the bank, and took up the bills of exchange in settlement of B.'s debt to the bank, and gave the bank a deed of trust on the same slaves, to secure the notes thus given. After this, S. bought these slaves of M., and agreed, in payment of them, to take up M.'s five notes to the bank, and did, by an arrangement with the bank, execute his own notes to the bank in lieu of those of M. and procured

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an order for their delivery by the agent of the bank which held them for collection to M. and delivered it to him; these slaves thus in S.'s possession were levied on under execution against M., older than the sale to S., and older than the deed of trust by M. to the bank, but younger than the original deed of trust to secure S. as accommodation acceptor; S. filed a bill to enjoin the sale under these executions, and to have the original deed of trust set up between the judgment creditors and the slaves; *held*, that the bill could not be maintained by S.; that if the original deed of trust were not extinguished by the execution of the notes by M. to the bank, neither was it by the execution of the notes by S. to the bank to take up those of M.; and the bank was the party entitled to the benefit of the lien; and S., therefore, could not enforce it, as he could not protect himself under an equity of the bank, which might never be asserted by the bank.

Where a man buys incumbered property, and agrees for the purchase-money to pay off the incumbrance and does pay it off, it seems the incumbrance is thereby extinguished and he cannot afterwards set it up and keep it alive for his own protection, when no such intention was manifested at the time.

Where a deed of trust on slaves was executed by M. to secure S. against loss as accommodation acceptor for M., and M. afterwards took up the bills thus accepted by S., by executing his own notes to the holder of the bills, and secured their payment by a deed of trust on the same slaves; which deed of trust the holder refused to take, unless M. would procure the release of another incumbrance junior to the original one to S., which was done; it was held that the arrangement between M. and the holder of the bills showed an intention to abandon and relinquish the lien of the original deed of trust, and look only to the one directly to the holder; and the original deed of trust was, therefore, extinguished by the execution of the new notes and deed of trust.

S. bought certain slaves of M. subject to a deed of trust, and in payment agreed to extinguish the deed of trust; there were judgments against M. older than the deed of trust or sale to S.; S. extinguished the incumbrance on the slaves, and they were levied on under the judgments; S. filed his bill for a rescission of the contract of purchase: *Held*, that S. was not entitled to have the contract rescinded; M. had made no false representations; nor had S. been at all deceived, and must abide by his bargain.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Theodore O. Starke filed his bill, in which he states, that in 1836 he was in partnership with Thomas Oxnard, jr. and William L. Hodge, in Woodville, under the name of Hodge, Starke & Co., and in New Orleans of Hodge, Oxnard & Co.; on the

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28th June, 1836, Henry A. Moore and H. N. Martin purchased from John Henderson twenty-three slaves, and, in payment, gave a bill of exchange on said firm for $7,853.39, due January 1, 1837, and three other bills for $5,000 each, due January 1, 1838, which were accepted; Moore and Martin executed a deed of trust to Edwin W. Morse, as trustee, on these negroes, to secure the acceptors from loss. Hodge, Oxnard & Co. paid the first bill at maturity, and were not indemnified for a considerable length of time by Moore and Martin, and finally only by a note for $7,855, still unpaid, but transferred by Hodge, Oxnard & Co. to the Commercial Bank of Natchez, who held the same at that time with Hodge, Oxnard & Co., indorsers thereon.

The three last bills were at maturity held by the Merchants Bank of New Orleans, and Moore proposed to renew the same by giving five notes for different sums due at different periods, with indorsers. The proposition was accepted, the notes prepared and delivered, but before the arrangement was completed and the parties released from the bills, Moore, who had become sole owner of the slaves, executed a deed of trust to Thomas Henderson, dated August 8, 1838, and filed for record December 10, 1838, to secure the five notes referred to.

Previous to the execution of the last deed, Moore, to secure sundry indorsers for his accommodation, executed a deed of trust on the 10th of April, 1838, to Morse, which, among other property, includes said slaves; the *cestuis que trust* in this deed released their claim on these slaves for the benefit of the *cestui que trusts* in the deed to Henderson; after which said bills of exchange were delivered up to be cancelled, and the notes of Moore received. Moore, on the 13th April, 1839, at New Orleans, sold to complainants all of these slaves, who placed them on his plantation in East Feliciana, La., and in payment for them complainant obtained an order from the Merchants Bank at New Orleans on the Commercial Bank of Natchez, for the five notes of Moore, which order was delivered to Moore, and was then in possession of D. Woodward, his administrator.

In October, 1839, William T. Lewis, the sheriff of Wilkinson county, by stratagem, procured these slaves to be brought into

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Wilkinson county, and levied on them as the property of Moore to satisfy various executions against him, and had advertised them for sale on the 8th of October, 1839; the execution creditors are very numerous; it is not necessary to set out their names. Complainant had solicited Lewis to desist from his attempt to subject these slaves to said executions, but combining with the execution creditors, about sixty in number, he refused to do so, and threatens to sell.

The bill prays for an injunction, on final hearing, to be perpetual; that the slaves may be surrendered to complainant, &c. Or, in the event they shall be decreed liable to satisfy the executions, that a rescission of the contract between complainant and Moore may be decreed, and Woodward be compelled to redeliver said order to complainant.

Starke afterwards filed an amended bill, stating that the three bills of exchange drawn by Moore and Martin on Hodge, Starke & Co. for $5,000 each were at their maturity the property of Briggs, Lacoste & Co. and not of the Merchants Bank, and so continued when the five notes of Moore and deed of trust were accepted by the Merchants Bank on account of Briggs, Lacoste & Co.; and the three bills were by Briggs, Lacoste & Co. surrendered up to be cancelled.

Most of the judgment creditors answered the bill, denying all knowledge of its allegations and calling for proof. The answer of Lewis, the sheriff, who was also a judgment creditor of Moore, in effect admitted the allegations of the bill; set out and insisted on the paramount liens of the judgments, which were rendered in the years 1837, 1838 and 1839, in favor of the respective judgment creditors. He states that said slaves were in the possession of Moore, in Wilkinson county, from the purchase in 1836 till April, 1839, when they were privately run out of the state. That he believes Moore sold the slaves to complainant in fraud of the creditors, and to defeat the judgments; complainant, before the sale, well knew of the judgments against Moore and his embarrassed circumstances.

It was proved on the part of Starke by Robert Copeland, cashier of the Merchants Bank, that Starke, by an arrangement

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with the bank, took up Moore's five notes due that bank and procured an order on the Commercial Bank of Natchez for them, at which latter bank they were lodged for collection.

Moise proved that this order had been by Starke subsequently delivered to Moore, and was then in his administrator's possession.

Thomas Henderson proved that he has the five notes of Moore given to the Merchants Bank in settlement of so much of the debt of Briggs, Lacoste & Co. to that bank, in his possession as cashier of the Commercial Bank of Natchez; he also has the deed of trust executed for their payment, and does not know who the owner is.

Charles A. Lacoste proved the agreement between Moore and Briggs, Lacoste & Co. and the Merchants Bank, by which the former paid Briggs, Lacoste & Co.'s debt to the latter, by executing his five notes as stated; and Briggs, Lacoste & Co. delivered up to Moore the three original bills of exchange accepted by Hodge, Oxnard & Co. for $5,000 each, which they held at maturity, and which Moore thus paid and took up; the arrangement was conducted by Thomas Henderson, as agent of the Merchants Bank.

T. S. Moise proved the sale from Moore to Starke of the slaves, in substance, as stated in the bill.

M. M. Simmons proved the delivery of the slaves to Starke, and their secret removal from this state to Louisiana.

The original deed of trust to Hodge, Oxnard & Co., and the deed of trust to the Merchants Bank were also in proof.

It is not deemed requisite to notice at greater length the evidence in the case.

The chancellor decreed a perpetual injunction against the judgments at law; and the defendants appealed.

G. Winchester, for appellants, contended,

1. That the main question was, Did Starke show a title to the slaves older and better than the judgment liens? He insisted he did not; 1, because his purchase was junior to those liens; 2, the deed of trust to Henderson for the Merchants

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Bank was also junior to them; and 3, the original deed of trust was extinguished by Moore, when he released the acceptors of the bills by giving his five notes to the Merchants Bank, and taking up the acceptances.

2. The evidence of Lacoste and Henderson wholly disprove the allegations of the bill of the continuance of the original debt, for which the acceptances were originally given; that debt was wholly paid by the execution of the new notes by Moore to a new party; it was not a mere change of the evidence of the debt or of securities; but the taking up, payment, cancelment, extinguishment of the deed of trust originally given, and the substitution of a new contract in its place with different parties.

3. The purchase by Starke of the slaves was in fraud of the judgment creditors' liens. (As the court did not pass on this point, the evidence and argument bearing on it are not further noticed.) On this point, the counsel for appellants reviewed the testimony at length, and cited 8 Term Rep. 530; Shep. Touch. 67; Douglas, 88; Rob. on Fraud. Con. 578; Ibid. 406; 1 John. Cases, 53; Cowper, 432, 434; 4 Binn. 474; 8 John. R. 451; 6 East, 257; *Griswold* v. *Marshall*, 2 Ch. Ca. 17; *Crisp* v. *Heath*, 2 Vin. Abr. 52, E.; 2 Vent. 361; *Willoughby* v. *Willoughby*, 8 Tenn. R. 763; Sug. Vend. 303.

Gordon, for Lewis, on same side, reviewed and commented on the testimony, and assumed substantially similar positions.

Montgomery and *Boyd*, for appellee, insisted,

1. That the original deed of trust was not extinguished by the arrangement with the Merchants Bank; they cited *Dunham* v. *Dey*, 15 John. R. 555; *Starr* v. *Ellis*, 6 John. Ch. R. 393; *Anderson* v. *Davies*, 6 Munf. 484; *Pratt* v. *Law*, 9 Cranch, 456; *McIntyre* v. *Agricultural Bank*, Freem. R. 105.

2. That there was no fraud in the purchase by Starke; on this point, the testimony was reviewed, and 9 Peters S. C. Rep. 625, cited.

3. That Lewis, as sheriff, who also claims to be a judgment

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creditor, could not assert any right that could oppose the claim of Starke successfully. *Stow* v. *Tifft*, 15 John. R. 459; *Roads* v. *Symmes*, 1 Ham. 281; *Calhoun* v. *Snider*, 6 Binn. 135.

4. The court of chancery had jurisdiction of the bill, even though the complainant may have had a remedy by a trial of the right of property at law, on the ground that the single suit in chancery would prevent the multiplicity of suits at law.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The appellee filed his bill in the superior court of chancery, to enjoin the sale, under executions, of certain slaves therein mentioned, and obtained a decree in his favor, from which the respondents below appealed.

The complainant claimed the slaves by a purchase from H. A. Moore, made on the 30th of April, 1839. The judgments, however, were older in date, and constituted liens, to avoid which, the complainant endeavors to protect himself under a deed of trust made by Moore, before the rendition of the judgments, by which the same slaves were conveyed in trust for the purpose therein mentioned.

The history of the transaction is as follows: In June, 1836, H. A. Moore and one Martin, purchased the slaves of John Henderson, giving him in payment four bills of exchange, one for the sum of $7853, and three others for the sum of $5000 each, drawn on a commercial firm in New Orleans, of which complainant Starke was a member, and by them accepted. To indemnify them for their acceptances, Moore and Martin conveyed the slaves to one Moise, in trust. This was the first incumbrance. The first bill of exchange, for $7853, was paid by the acceptors, and they were not indemnified for some time afterwards, and ultimately only by the note of Moore, who had purchased Martin's interest very soon after they purchased the negroes. This note was transferred by the commercial firm, to the Commercial Bank of Natchez, the complainant Starke being still liable thereon as indorser.

The other bills of exchange fell into the hands of Briggs, Lacoste & Co., who, it seems, were indebted to the Merchants

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Bank of New Orleans. By a mutual arrangement between the parties, Moore undertook to pay the Merchants Bank the amount of the three bills for Briggs, Lacoste & Co. This he did by giving five notes, with the further security of a deed of trust on the same slaves, to Thomas Henderson, for the use of the bank. The bills were taken up, and Briggs, Lacoste & Co. credited by the amount of Moore's notes. This was in August, 1838, but the deed was not recorded until December, 1838.

Prior to this arrangement, Moore had executed another deed of trust on these negroes to secure certain indorsers, who, however, relinquished their lien in favor of the bank. It would seem that the bank refused to consummate the arrangement until this relinquishment was procured.

On the 13th of April, 1839, Moore sold the negroes to Starke. The sale took place in New Orleans, and the negroes were afterwards taken from Wilkinson county in this state, and delivered in Louisiana. In payment for the negroes, Starke agreed to lift the five notes which Moore had given to the Merchants Bank. He accordingly made some arrangement with the bank, and procured an order on the Commercial Bank of Natchez for the notes, they having been deposited there for collection. This order was withheld from Moore, until he should relieve the negroes from some incumbrance. It was, however, ultimately delivered to him, and is now in the hands of his administrator, though the notes never have been delivered.

In October, 1839, the sheriff of Wilkinson county, by some stratagem, procured the negroes to be brought back to that county, and levied sundry executions on them, and was about proceeding to sell when this bill was filed. The judgments, with one exception, are younger than the first deed of trust given to Moise to secure the acceptors of the bills; and all but two, older than the deed given to Henderson to secure the bank; and all older than the purchase by Starke. It is evident, therefore, that Starke cannot protect himself under his own purchase, because the judgments constitute prior liens. For the same reason he cannot rely on the deed given to Hen-

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derson to secure the bank. He therefore endeavors to shelter himself under the first deed, given to secure his firm for their acceptances, and the question is, can he do so?

As a general rule, a mere change in the form of the evidence of indebtedness, will not operate to discharge a lien given to secure a debt, unless it is apparent that the parties intended to extinguish the lien. Whenever it is clear that the creditor still intended to retain it, his right is not affected by a mere change of the instrument, which is the evidence of the debt, as the debt itself is the thing for which the lien was given. But can Starke, who professes to have acquired a legal title, claim also under a prior equity? A prior equity generally sinks or merges in a subsequently acquired legal title, but not so as to affect any valid lien. This is a legal consequence, and it will follow, unless there be some declared intent to prevent it, or some beneficial purpose to the holder not inconsistent with the rights of others. "A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party. It must, at all events, be an innocent purpose, and injurious to no one." *Starr* v. *Ellis*, 6 John. C. R. 393. The facts in this case do not indicate anything like a design to keep the first incumbrance alive. On the contrary, the parties do not seem to have looked to that as constituting an available lien to the holders of the bills.

In the first place, Starke & Co. had accepted bills, and took a lien to save themselves harmless. The first bill they paid. They might have enforced the trust to that amount. They did not do so, but took a note for the amount, which they transferred to the Commercial Bank of Natchez. This note was either a payment of the debt, or it was not. If it satisfied the debt as so much money would have done, then of course to that extent their lien was extinguished. If it did not satisfy the debt, then by transferring the note, they also transferred the lien. That they are liable as indorsers, does not entitle them to proceed on the lien until they pay the debt and take a reassignment. This is the condition of complainant with regard to the first bill.

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In regard to the other bills, as Starke & Co. did not pay them, they, of course, had no right to enforce the trust as to them. If any one had such right, it vested in Briggs, Lacoste & Co. as holders. They did not claim it. The security was not given to them. A bill in chancery was therefore requisite before they could avail themselves of the deed of trust. Suppose they could have done so, still a court of chancery will not force it on them. But if they were entitled to the benefit of the security, what became of that right in their arrangement with the bank? It was either extinguished, or it was transferred. If it was transferred, the bank has either relinquished or still holds it. If it was not extinguished by the bank in taking the notes of Moore, neither was it extinguished by taking the notes of Starke in exchange for those of Moore. Starke does not say that he paid the debt to the bank; and if the security is to be kept alive as long as the debt exists, it must of course be a security in the hands of the holder of the debt. Starke is therefore attempting to protect himself under the equities of others, which may never be asserted. On this view of the subject, Starke owes a debt to the bank, which is collaterally secured by a deed of trust, of which he of course can claim no benefit.

But the transaction with the bank looks very much like a waiver of any prior lien, if any existed. We must suppose that the deed of trust to Henderson to secure the five notes of Moore, was looked to and intended as the true and only security. Starke did not take an assignment of the incumbrances, or purchase them in. He purchased an incumbered property, giving no other price than the debt for which it was incumbered. This can be regarded in no other light than a payment. He purchased the incumbrance from the bank, if it existed, and gave it to Moore for the thing incumbered. Starke now claims to be the owner of the property which was once incumbered, and in order to protect it, wishes to rely on the incumbrance, although no intention was manifested to keep it alive. On the contrary, every act in connection with this matter, seems to favor the idea that the original lien was abandoned. The bank relied upon the security of the deed of trust to Henderson, and

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even refused to consummate the arrangement until the property should be released from another deed of trust, which was subsequent to the original lien given to Starke. After all this, it is too late to resort to an equitable incumbrance which once existed, but which in fact has been discharged by payment.

The prayer is in the alternative, that if the relief should not be granted, then that the contract between Starke and Moore be rescinded. There is no ground for a rescission; no allegation of fraud. Starke purchased with notice, and if his bargain has turned out to be an unfortunate one, that is no reason for its rescission. He had not only constructive notice of the judgment liens, but seems to have had actual notice. The whole transaction shows this — Moore made no false representations, nor did Starke labor under any deception from any source. He is consequently not entitled to have the contract rescinded.

Decree reversed.

THOMAS B. GILLIAM *vs.* MOSES B. MOORE.

The legislature in 1820 (H. & H. 591, § 13,) passed an act providing that if in detinue, on an issue concerning several things in one count, no verdict be found for part of them, it should not be error, but the plaintiff should be barred of his title to the things omitted; in 1830 they passed an act (H. & H. 654, § 75,) providing that issues for the trial of the right of any property should be tried and governed by the same rules which regulate and govern the trial of issues in an action of detinue; it was *held*, that the legislature, by the use of the word "*detinue*" in the latter act, had reference to the action as modified by the former statute.

Therefore, in an issue to try the right of property in six slaves, it will not be error for the jury to find only as to four, and bring in no verdict as to the others.

In a trial of the right of property in slaves, the claimant relied on his purchase of the slaves under a deed of trust given by the defendant in execution to secure him from loss in consequence of his suretyship for the defend-

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ant in execution; the court below, after having instructed the jury that the deed of trust was *prima facie* good and valid, instructed them that it rested with the claimant to prove the consideration of the deed of trust to be fair and *bona fide*, and to show clearly that he was liable for the payment of the debts named in the deed of trust, as surety for the defendant in execution; it was *held* that this latter instruction was erroneous, because it implied that the plaintiff in execution had made out a *prima facie* case of fraud, with reference to the deed of trust; the court should have added the qualification, "if the jury believe from the evidence that a *prima facie* case of fraud has been made out, then the claimant must prove," &c.

It is the peculiar province of the jury to pass upon questions of fraud in fact; it is, therefore, erroneous for a court to predicate instructions to the jury, based upon the existence of fraud in fact, without informing the jury that it is for them to judge whether fraud exists.

It was held, therefore, to be erroneous, and to be instructing the jury as to the weight of evidence, to instruct them in an issue to try the right of property where the claimant claimed under a deed of trust, that the deed of trust was not of itself evidence that the claimant was bound as surety in the mode in which the deed recited him to be bound, or that the defendant in execution was indebted to the claimant, as recited in the deed, but that they must look to the other proof for the establishment of those points.

Where an instruction is erroneous, as assuming that fraud in fact exists, the error will not be cured because the record contains proof that seems to make out a case of fraud; the jury have a right to pass on the question, and it is neither for the court below, nor for the high court of errors and appeals to preclude them from that inquiry.

In error from the circuit court of Tippah county; Hon. Hugh R. Miller, judge.

On the 13th day of December, 1843, the sheriff of Tippah county, by virtue of an execution in favor of Moses B. Moore against Edward Pegram, levied on six slaves, as the property of Pegram. Thomas B. Gilliam claimed them, according to the statute, as his property; and at the January term, 1844, an issue was made up to try the right of property. On the trial the record and proceedings in the judgment against Pegram were read, by which it appeared that Moore's judgment was rendered in the Tippah circuit court, on the 29th of March, 1843, for $1,760.44; on which the execution was issued and levied, as stated.

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Samuel Mathews, in behalf of the plaintiff in execution, proved that in March, 1840, Pegram removed his slaves to this state from Tennessee, to avoid certain debts he owed there. The witness, soon after the arrival of Pegram, was called up to act as a trustee in a deed of trust from Pegram to secure Gilliam from liability on various debts, on which he was surety for Pegram. This deed conveyed all his horses, cattle, sheep, hogs, household and kitchen furniture, and the crop of cotton to be raised that year. About the same time Pegram made another deed of trust to William S. Winfield, for the purpose of securing Gilliam in other debts. In December, 1842, the witness sold the property conveyed to him, by direction of Gilliam, except a small part previously sold by consent of Gilliam; on the same day Winfield sold under his deed of trust which conveyed the slaves; Gilliam purchased all the property sold under both sales, amounting to about four thousand two or three hundred dollars. Pegram's crop of cotton of the year 1841, was shipped by Gilliam; it was about ninety-five bales; the crop of the year 1842 was sixty-five bales, which, after supporting Pegram's family, witness understood from the parties, was appropriated to the debts secured by the deeds of trust. Among the latter was one to John Booth, for about $2800, given for the land on which Pegram lived. Gilliam was principal, Pegram surety; the deed was made to Gilliam. In January, 1843, Gilliam employed Pegram, as manager, to live on this land, and take charge of the property purchased by Gilliam under the deed of trust; Gilliam was to support Pegram's family. Under this arrangement Pegram lived on the place for the year 1843, and made a good crop, which was applied as the former ones. The witness was employed by Booth to collect his accounts, among them, including the debt secured by the deed of trust, was about $8000 due by Gilliam. In the fall of 1843 the witness and Gilliam agreed on a compromise of this debt; Booth to take back the land at $5000, Gilliam to pay $2000 in cash, and confess judgment for the residue. A day was fixed for concluding the compromise, at Gilliam's house; prior to which Pegram called on witness, and stated that if he would release

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Gilliam from the payment of the $2000, and take him and his son Samuel for that amount, Gilliam was willing to convey all the slaves which he had bought under the deed of trust to his son Samuel; and urged the witness with much feeling to do it; the witness declined, but told Pegram if he would raise the $2000, it could be done. Pegram replied, he would endeavor to raise the money. On the day appointed for the compromise they all met at the house of Gilliam. Pegram again privately urged on witness, with great earnestness, his former proposition, and said if it were refused he should be ruined, as Gilliam would certainly sell the negroes to reimburse himself the amount he had to pay. Witness still refused, informed Gilliam of his refusal, and the latter completed the arrangement. Soon after this Gilliam sold to different persons several of the slaves for about $4000.

William Pegram, for plaintiff in execution, testified that his father, the defendant, came to this state in 1840, with about eighteen slaves, including those levied on, all of whom were conveyed by the deed of trust to secure Gilliam. He also proved the value of the slaves levied on. Gilliam sold a portion of the slaves conveyed to him, and a portion were still in his possession in De Soto county. Pegram married Gilliam's sister. The latter, in 1843, lived in Tippah county, afterwards moved to De Soto county; the six slaves levied on were in the possession of Gilliam, on the place where they had been before and after the sale, under the deed of trust, in December, 1842, until levied on. Edward Pegram was managing the slaves and place, as overseer for Gilliam, and lived on it since the sale under the deed of trust, until and after the slaves were levied on.

The plaintiff then read the deed of trust by Pegram to Mathews, containing the stock, &c. and crop of cotton, in trust, with power of sale, to secure Gilliam against liability on about $4000 of debt, for which he was surety for Pegram. Here the plaintiff's case closed.

The defendant then read the deed of trust to Winfield, to secure Gilliam in about the sum of $9000 of other liabilities as surety for Pegram and money paid for Pegram to different persons.

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He proved also the advertisements of sale of the property under the deeds of trust, in accordance with their provisions; and the bill of sale of the slaves in controversy, from the trustee to him; and proved by A. C. Blair that the sale was a public and a fair one; many persons present, and Gilliam urging persons to bid; the amount bid was credited on the deed of trust.

E. B. Smith proved that Gilliam had paid $3600 to the Planters Bank of Tennessee, being one of the debts named in the deed of trust to Winfield; but whether with his own or Pegram's money, he did not know.

C. Loffland proved the same with reference to another debt for upwards of $2000, secured by the same deed of trust.

This being all the testimony, the court, at the instance of the claimant, instructed the jury,

1. That if they believed, from the evidence, that the deed, under which the claimant derived title, was executed in good faith to secure a *bona fide* debt, and that no fraud was practised by the parties to delay or hinder creditors, it was a valid deed; the title under it was good, and the property not subject to execution.

2. That an indebted party has the right to prefer, in good faith, one creditor to another, and his sureties to others.

3. That the parties to a deed of trust may legally provide for the grantor to remain in possession of the property conveyed, until the last debt is due on the deed legally closed; and his so remaining in possession is not fraudulent.

4. That the burden of proof is on the plaintiff in execution, and fraud is not to be presumed, but must be proved.

5. That the deed of trust to Winfield on its face, is *prima facie* good and valid.

6. That an equitable interest is not the subject of law by a common law execution.

7. That a deed of trust, valid when executed, cannot be made void by after circumstances; and that if a fair deed of trust be *bona fide* made to secure a debt really due, an after deed of trust between the same parties, although fraudulent, can in nowise impair or make void the first deed.

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Various other instructions were also asked by the claimant, and given, which it is not deemed necessary to set out.

The court then, at the instance of the plaintiff in execution, gave these instructions:

1. A deed made to hinder and delay creditors of the grantor, is fraudulent and void.

2. It rests upon Gilliam, the claimant, to prove the consideration, moving to the execution of the deed of trust under which he claims, fair and *bona fide;* showing he was clearly liable, as security of Pegram, for the payment of the debts, provided for in the deed of trust.

3. A deed, colorable and fraudulent as to part, is fraudulent and void as to the whole.

4. The possession of personal property by the grantor, in a deed of trust, after the period in which, by the terms of the deed of trust the money is to be paid, to secure which the deed of trust was given, may be *prima facie* evidence of fraud. Creditors, or those bound as security for other persons, cannot be permitted to secure their honest debts on the debtor's property, and at the same time to cover his property from every other creditor, with intent to let the debtor use and exhaust his means of payment, secretly reserving the property intended to be applied in satisfaction of the debts to be secured.

5. A deed of trust, valid in its inception, and which vested the title of the property in the grantee then, could not by after circumstances be rendered void; yet after circumstances could be evidence of the original intent of the parties, to hinder and delay creditors of the grantor, not provided for by the deed.

6. If, from the evidence, the jury believe Pegram paid the money which was raised by sale, then the circumstance that the negroes were bid off by Gilliam, is a fact which may be weighed by the jury.

7. In cases of fraud the jury must weigh all the circumstances given in evidence, and draw a fair and reasonable conclusion from them.

The jury retired with these charges, but afterwards returned and asked for further instructions, when the court instructed the jury as follows, viz.:

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1. A deed of trust, providing that the property conveyed shall remain in possession of the grantor is not, for that reason alone, fraudulent or void; but circumstances may be weighed by the jury, in connection with other testimony, to ascertain whether a fraudulent intent existed; the jury must look to all the testimony, written and verbal, and consider it all together.

2. That the deed in trust from Pegram to Winfield, for the benefit of Gilliam, is not of itself evidence that Gilliam had paid debts for Pegram, or that he was bound as surety for Pegram, or that Pegram was indebted to him, but that the jury must look to the other proof in the case to ascertain whether Pegram was indebted to Gilliam, or was bound as surety for Pegram.

To these instructions the claimant excepted. The jury found that four of the slaves levied on were subject to the execution of Moore, and assessed their respective values, but took no notice in their verdict of the other two slaves. Gilliam moved for a new trial, which being refused, he prosecuted this writ of error.

Word, for plaintiff in error, commented on the testimony, and made these points:

1. That the testimony was insufficient to uphold the verdict.

2. That the court misdirected the jury. *Buckner* v. *Hundley*, 6 S. & M. 70.

3. That the verdict and judgment thereon were insufficient. *McCoy* v. *Rives*, 1 S. & M. 592; H. & H. 591, § 13; Ibid. 654, §§ 75, 77, 78, 79; 7 Bac. Abridg. Tit. Stat. 454, 456, 458; 1 How. (Mi.) R. 227.

Walter, on the same side, relied on the same points.

M. A. Watson, for defendant in error.

1. The testimony sustains the verdict; on this point the testimony was reviewed, and it was insisted that a case of fraud was made out. *Bogard* v. *Gardley*, 4 S. & M. 302; 11 Mass. 421; 2 Pick. 411; 2 Kent, 441; 4 Yerg. 450; 1 S. & M. 381; 4 Ibid. 193, 257; 5 How. (Mi.) 495; 7 Ibid. 340; 5 Wend. 48; 12 Ibid. 340.

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2. The omission in the verdict is cured by the statutes regulating the action of detinue, and trials of the right of property, and the verdict is correct. How. & Hutch. 591, § 13; Ibid. 654, § 75; *Penrice* v. *Cocks*, 1 How. (Mi.) R. 227; *McCoy* v. *Rives*, 1 S. & M. 592; 2 Wheat. 221; 1 Bibb, 248, 257; 2 Ibid. 178, 429; 1 Alab. 212; 2 S. & M. 439.

3. It is manifest that justice has been done; the law and facts sustain the verdict; error therefore in the charges will not avail to set it aside. *Perry* v. *Clarke*, 5 How. (Mi.) R. 495; 7 Ibid. 328; 1 S. & M. 22, 400; 4 Ibid. 193.

4. The charges complained of, under the facts were not erroneous. *Rogers* v. *Hall*, 4 Watts Rep. 359; *Jones* v. *Reid*, 1 Humph. 335, 345; *Darwin* v. *Handley*, 3 Yerg. 502, 503, 504; *Hundley* v. *Buckner*, 6 S. & M. 70; 4 Ibid. 302; 5 Lit. 239; *Hundley* v. *Weld*, 3 J. J. Marsh. 643.

Mr. Justice THACHER delivered the opinion of the court.

This was a trial of the right of property. The jury were called to pass upon the right of property in six slaves. They found as to four, but found no verdict as to the remaining two. This, under the statute, was tantamount to a finding, that the slaves omitted were not subject to the plaintiff's execution. In 1820, an act was passed (H. & H. 591, § 13,) providing that, if in detinue, the verdict shall omit price or value, the court may, at any time, award a writ of inquiry to ascertain the same; and, if on an issue concerning several things in one count, in detinue, no verdict be found for part of them, it shall not be error, but the plaintiff shall be barred of his title to the things omitted; and, in 1830, an act was passed, (H. & H. 654, § 75,) providing that issues for the trial of the right of any property, should be tried and governed by the same rules which regulate and govern the trial of issues in actions of detinue. The common law action of detinue having been thus modified by statute in 1820, whenever the action is mentioned in subsequent acts, by obvious rules of interpretation, the statutory action and not the common law action must be intended. This view seems already to have been entertained by the court, in

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Pritchard v. *Myers*, 3 S. & M. 42, where, in a case in which the jury omitted to assess the separate value of each specific thing in issue, it intimates strongly that a writ of inquiry, in accordance with the law of 1820, might have been awarded for the purpose. In the case of *McCoy* v. *Rives*, 1 S. & M. 592, the statutory provision was not put in question; and, besides, that was a case of a finding by the jury upon an article of property not in issue, as well as of an omission of a finding upon property in issue. The question being now fully presented, is therefore met and settled.

But upon the trial, the court gave instructions which were too broad and prejudicial in their tendency to the rights of the claimant. He relied, in his defence, upon a deed of trust for his benefit and purchase under a deed of trust. The court charged, that it rested with the claimant to prove the consideration moving to the execution of the deed of trust under which he claimed, fair and *bona fide*, showing he was clearly liable as security of the defendant in execution, for the payment of the debts provided for in the deed of trust. The court having previously instructed the jury, that the deed of trust under which the claimant claimed title, was *prima facie* good and valid, it follows that the charge first mentioned went to the extent of instructing the jury, that the evidence of the plaintiff in execution had established at least a *prima facie* case of fraud in the claimant's title, which it made incumbent on the claimant to rebut. Now, this was purely a consideration for the jury, whose peculiar province it is to pass upon questions of fraud in fact; and therefore the charge first mentioned should have contained a provision, depending upon the conviction of the jury as to the fact of *prima facie* fraud having been established. It will not do to say that the record shows that such a state of case really existed, because neither this court nor the court below can, in circumstances like these, presume to weigh the evidence. The first part of the following charge is obnoxious to the same objection, because it takes for granted what was a matter in issue to the jury alone. The court charged — that the deed in trust from the defendant in execution to Winfield,

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for the benefit of the claimant, is not of itself evidence that the claimant had paid debts for the defendant in execution, or that he was bound as surety for him, or that the defendant in execution was indebted to the claimant, but that the jury must look to the other proof in the case, to ascertain whether the defendant in execution was indebted to the claimant, or whether the claimant was bound as surety for the defendant in execution. When we bear in mind, that in these cases, the burden of proof rests with the plaintiff in execution, these charges display a plain and unqualified ruling upon the evidence against the claimant, which was in opposition to the statute controlling the charges of courts.

Judgment reversed, and new trial to be awarded below.

LEWIS WILLIAMS ET AL. *vs.* JOHN A. MILLER.

Whether a party to a *negotiable instrument*, who has given it credit and currency, by his signature, shall afterwards be admitted as a witness, in a suit between other persons, to prove the instrument *originally void*,—*Quære?*

A party to a *non-negotiable* instrument is admissible, as a witness *to prove it void;* or, if the instrument be negotiable, he is competent to prove payment, or anything which does not impeach the note, but only goes to show its discharge, or he is competent to testify if he has indorsed the note without recourse.

W., as principal, and others, as sureties, being indebted, by joint note, to P., W. paid the note to P., and the latter delivered up the note to W., who prevailed upon P. to indorse it, after the payment, without recourse; in an action on the note, against the principal and sureties, by M., it was *held*, that P. was a competent witness to prove these facts.

IN error from the Claiborne circuit court; Hon. Stanhope Posey, judge.

John A. Miller sued upon a note made by H. & H. O. Anderson, A. K. Shaifer, H. W. Barnes, and Lewis Williams, dated June 24, 1839, for $5,000, payable five years after date

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to A. W. Putnam, with six per cent. interest, annually, at the Fulton Bank of New York.

The note is indorsed as follows:

"I have given this note up to G. G. Torrey, for bank stock, Bank P. Gibson, without recourse.

"PUTNAM."

"Pay, without recourse on me.

"G. G. TORREY."

The declaration alleges, that A. W. Putnam, by the name and signature of "Putnam," indorsed the note to Torrey, and that Torrey indorsed the note to plaintiff.

The suit was dismissed, as to all the defendants but Williams, who had pleaded three pleas: — 1. Non assumpsit, and 2. Payment on the 1st of April, 1842, by H. O. Anderson, one of the joint drawers, to A. W. Putnam, while Putnam was the *bona fide* owner and holder of the note; and 3. Accord and satisfaction, by the delivery, by H. & H. O. Anderson, on the 11th of June, 1843, of fifty shares of stock of the Bank of Port Gibson, to A. W. Putnam, while he was the owner and holder of the note, who accepted the said stock in satisfaction. Issue was joined on these pleas.

On the trial of the cause, the defendant offered in evidence the deposition of A. W. Putnam, the payee of the note, to prove that before he indorsed the note to Torrey, it had been fully paid to him by Anderson, and that he had been prevailed upon by Anderson to indorse it, after payment, without recourse. The deposition being objected to, was ruled out by the court, and a verdict thereupon rendered for the plaintiff below; for the judgment on which, Williams prosecutes this writ of error.

Hoopes, for plaintiff in error.

A person who has indorsed a promissory note is a competent witness to prove the note void. 1 Greenleaf's Evid. 453; *Bank of Utica* v. *Hilliard*, 5 Cowen's Rep. 153; *Claiborne* v. *Planters Bank*, 2 How. (Mi.) Rep. 728. By the common law, every person not interested, and not of an infamous character, may be a witness. 2 Binney's Rep. 165; *Williams* v. *Wal-*

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bridge, 3 Wend. 415; *Taylor* v. *Beck*, 3 Rand. 316; 2 Yerger, 38, 39, 40—48; *Walton* v. *Shelley*, 1 T. R. 296; *Jordaine* v. *Lashbrooke*, 7 Term. Rep. 601. See also *Stafford* v. *Rice*, 5 Cow. Rep. 23; *Bank of Utica* v. *Hilliard*, 5 Ib. 153; *Williams* v. *Walbridge*, 3 Wend. Rep. 415; *Taylor* v. *Beck*, 3 Rand. 316; 2 Yerger, 38—48.

William and *William G. Thompson*, on same side, cited and relied on *Routh* v. *Helm*, 6 How. (Mi.) Rep. 127, and *Commercial and Rail Road Bank of Vicksburg* v. *Lum*, 7 How. (Mi.) Rep. 414.

J. B. Thrasher, for defendant in error.

Judges have been much divided in opinion. The leading case against the admissibility is, that of *Walton* v. *Shelly*, 1 T. R. 296. But the rule, that such a witness is not admissible, seems at present to be the settled law of this country, as recognized and laid down by the highest national tribunal, and by the case of *Drake* v. *Henly*, decided by this court. Walker, 541; 8 Peters, 12; 11 Peters, 86, 94, 95; 6 Peters, 51, 57; 12 Peters, 149; 2 Sumner, 235, per Story, J.; 4 Mass. 156; 16 Mass. 118; 17 Mass. 122; 1 Metcalf, R. 416; 1 Greenleaf on Ev. 430, § 385.

H. T. Ellett, on same side,

Relied on *Walton* v. *Shelley*, 1 Term. Rep. 296; *Bank of Metropolis* v. *Jones*, 8 Peters, 16; *Henderson* v. *Anderson*, 3 How. S. C. Rep. 73; Walk. Rep. 541; 1 Greenl. Ev. 529, §§ 383—385, note.

Mr. Justice CLAYTON delivered the opinion of the court.

The only question in this cause is, whether Putnam's deposition was rightly excluded. He was the payee of the note, and his testimony was offered to show, that the note had been paid to him, and delivered up to the maker, the principal debtor, who prevailed upon him to indorse it, after the payment, without recourse.

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Whether a party *to a negotiable instrument*, who has given it credit and currency by his signature, shall afterwards be admitted as a witness in a suit between other persons, to prove the instrument *originally void*, is a question upon which judges have been much divided in opinion. In England, the rule against the admissibility of such party, formerly prevailed; but the rule at present received, is in favor of his competency, if there be no other objection. 1 Greenl. Ev. 529, 530. In the United States, the courts are arrayed on both sides of the rule. The supreme court of the United States, holds the witness in such case to be incompetent. *Bank of United States* v. *Dunn*, 6 Peters, 51; *Bank of Metropolis* v. *Jones*, 8 Peters, 12. Many of the cases in the state courts, are collected in 2 Phil. Ev. 72, Cow. & Hill's notes.

"But the rule of exclusion is referred to the ground of public convenience, and seems to be restricted in its application to the case of a negotiable security, actually negotiated and put into circulation before its maturity, and still in the hands of an innocent indorsee, without notice of the alleged original infirmity, or any other defect in the contract." 1 Green. 531. This is the extent of the rule adopted in the Supreme Court of the United States. *United States* v. *Leffler*, 11 Peters, 95; *Scott* v. *Lloyd*, 12 Peters, 149. The party is admissible, where the instrument is not negotiable, or where he is called to prove payment, or anything which does not impeach the note, but only goes to show its discharge, provided he is not interested, or liable to other objection. The rule thus laid down, has been recognized in this state. *Routh* v. *Helm*, 6 How. 127. It has likewise been decided, that where the party called as a witness, has indorsed, without recourse, he is competent. *Parker* v. *Hanson*, 7 Mass. 470; *Gorham* v. *Carroll*, 3 Littell, 221.

These exceptions entirely cover the present case. Without entering upon the consideration of the vexed question, involved in the general proposition of the competency of the witness, in regard to negotiable paper actually negotiated in due course of trade, we may safely say, that the testimony in this instance was improperly rejected.

The judgment is reversed, and new trial granted.

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Phillip Hoggatt *vs.* Benjamin Wade et al.

M. as administrator of R. M., deceased, had sold a tract of land to G. and taken his notes, with surety, for payment, and had retained the statutory lien upon the premises, as further security. G. became insolvent, leaving one of the notes unpaid, and M. having exhausted his remedy at law, was proceeding to enforce his statutory lien against the land. W. had purchased the land of G. and given his notes therefor, one of which had been transferred to H. who had brought suit upon it; the deed from M. to G. showed that the land was sold by him, as administrator, under an order of the probate court, and that a portion of the purchase-money had not become due at the time G. sold to W. *Held*, that W. was justly chargeable with notice, and could occupy no better place than G., and that M. had a right to priority of satisfaction.

It is the duty of an administrator, when he sells the land of his intestate, to take personal security for the payment of the purchase-money, and his performance or non-performance of that duty does not affect the statutory lien; each is intended to be cumulative. Whether anything short of actual payment will discharge the lien,—*Quære?*

M. as administrator of R. M., deceased, sold a tract of land to G. and B., and took the separate notes of each, with personal security, for their respective halves of the purchase-money. *Held*, that there was nothing in this transaction which could release the statutory lien.

The statutory lien is for the benefit of the estate, and the administrator ought not, by construction, to be held to have done anything to its prejudice.

Appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Benjamin Wade filed a bill of interpleader, in which he states, that in December, 1835, he became the purchaser of the undivided half of certain lots in Natchez, from H. Gridley, for $8,500. He gave three notes, the last of which for $2,833.33, is now due and unpaid. P. Hoggatt, the owner of the note, brought suit upon it in the Adams circuit court. These lots

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were purchased originally by Horace Gridley and John Bailey, at the sale of Robert Moore's estate by A. P. Merrill, his administrator, under an order of the probate court for the sum of $13,892, for which Gridley and Bailey "executed their obligations in three several instalments, for their portions or parts respectively." That, of Gridley's part, there is still due $2,925.96, for which Merrill has obtained judgment for $2,393.96. Merrill being unable to collect from Gridley, threatened to enforce a statutory lien on the lots, and instructed his solicitors to file a bill of foreclosure. He avers, that he had no notice of any such claim or lien till lately, and long after his purchase; is willing to pay, but does not know to whom he can safely pay his note, &c., prays that Merrill and Hoggatt interplead, and for the usual injunctions and relief. His amended bill alleges that Gridley is insolvent, and no recovery could be had on his deed.

Hoggatt's answer states that he has no personal knowledge of the matters set forth in Wade's bill. That he is the owner of the note in question and took it in the ordinary course of business. That Merrill, the administrator of Moore, when he sold the lots, waived all statutory liens, by taking other and different security than that required by law; the lots were sold at the administrator's sale to Gridley and Bailey, as tenants in common, as will appear by Merrill's deed to them. That Merrill did not take from Gridley and Bailey, bonds with security according to law, or if he did, they had been discharged, so that no lien exists, and he prays that Merrill be enjoined from attempting to enforce it. That Bailey is dead, having ample means to satisfy Merrill's claim, if he had taken his bonds jointly with Gridley, according to law, and the same would have been paid. Insists that Wade holds the land discharged of the lien, having had no actual notice, and the constructive one was from the deed, which was, that Merrill had taken the joint bonds of Gridley and Bailey, with good security, and if he had done so the debt would have been paid. Insists that Merrill had misled subsequent purchasers, by keeping the lien out of view, and by taking security contrary to law, and leav-

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ing out parties to the contract on the notes, who were parties to the purchase, and who were able to pay the debt without resorting to the lien, so that he (Merrill) has forfeited the lien as to *bona fide* purchasers without notice, and he ought to be the loser.

Merrill's answer admits the allegations in Wade's bill, except as modified in his interpleader with Hoggatt. He there states, that in pursuance of an order of the probate court, he sold, on the 23d, 24th, 25th and 26th of December, 1833, all the estate of R. Moore. That Gridley purchased two of the lots for $13,892; the terms of sale were openly and publicly proclaimed at the time, and were, that the purchaser should give personal security, and a mortgage on the property, and the credit on the land to be one, two and three years. After the sale, Gridley told him that Bailey had agreed to become jointly interested in the purchase, and he offered Bailey's notes for half of the purchase-money, and requested the deed to be made to them jointly, which was done, as Bailey was considered to be worth more than Gridley. He took three notes from Gridley, and three from Bailey, with indorsers to his satisfaction. That it was agreed between him, and Gridley and Bailey, that they should execute a mortgage to secure said notes according to the terms of sale, but this idea was given up in order to save expense and after advice of counsel, that the statutes gave a mortgage or lien. Of this he informed Gridley and Bailey, and has never in any way waived the lien. Bailey's notes had been paid, and the first two of Gridley's. On the last, he has a judgment for $2,393.96, and he has had Gridley's property sold under execution, and the proceeds had been applied to older executions. Gridley is wholly insolvent, and the judgment is unsatisfied, and will remain so, unless he can enforce his lien.

The deed from Merrill to Gridley and Bailey recites a sale to them jointly, and states the consideration to be $13,892, secured to be paid in three annual instalments, according to the tenor of the order of the probate court.

It being agreed that all objections to the propriety of the interpleader should be waived, and that the chancellor should

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proceed to decide the case fully on the merits, it was decreed: That Wade should pay to A. P. Merrill, the said sum of $2,953.71, with interest thereon from the date of the decree, and that he should pay the remaining sum of $705.09 to Hoggatt, with interest from the date of the decree, and that Hoggatt should be perpetually enjoined from further proceeding to collect and enforce the payment of the residue of said note of $2,833.33. Hoggatt appealed.

Montgomery and *Boyd* for appellants, contended,

1. That Merrill's executing the deed jointly to Gridley and Bailey, and taking their notes separately for their respective portions, was a waiver of the statutory mortgage, as Merrill thereby misled and deceived subsequent purchasers of the property, who would have good reason to suppose that Bailey was a party to all the notes. 18 Johns. R. 544; 7 Cranch, 50.

2. That there was nothing of record to give notice of the statutory lien to secure the note of Gridley individually; nothing to connect it with the land; and that Hoggatt, being a *bona fide* purchaser of the note, without notice of the lien, cannot be affected by the latent equity in favor of Merrill, whose laches and negligence in giving the deed jointly, and taking the notes separately, by misleading Hoggatt produced the loss, and he, therefore, ought to be the sufferer, and not Hoggatt.

3. That the facts of the case proved a waiver of the lien by Merrill, who, notwithstanding his fiduciary character, would be held in equity to have postponed his statutory mortgage to the rights of a *bona fide* holder, without notice of the note. 1 Powell on Mort. 528, 529, and notes; 1b. 531; 1 P. Wms. 279; 18 Johns. R. 544; 1 Johns. Ch. R. 288.

Mandeville, for appellee, insisted,

1. That Merrill had not lost his statutory lien by taking notes instead of bonds, as required by the statute. Rev. Code, 56, 57; How. & Hutch. 407, 408. That the statutes were merely directory, and recognized notes as well as bonds. Rev. Code, 64, § 100.

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2. That Merrill had not lost his lien by taking the several notes of Gridley and Bailey, instead of their joint notes; he cited 1 Hill Abr. 240, § 64. The law giving the statutory mortgage, (How. & Hutch. 417, § 110; Laws 1829, p. 173, § 3,) gives the lien, 1st, even where the property has passed to an assignee, in all cases, whether the assignee had notice of the lien or not; 2d. It gives the lien to secure "the payment of the sum or sums for which the property was sold;" and not of the bond or note; 3d. It makes the lien a mortgage. Paine's C. C. R. 525; 1 Pet. Dig. 428, § 14; 1 How. R. 559.

3. The registration of the deed, or mortgage, is constructive notice of their legal import to all the world; whether the title or incumbrance be equitable or legal. 1 Story's Eq. Jur. 392, § 403; 1 Johns. Ch. R. 398.

4. A purchaser is presumed to have knowledge of any fact contained in a deed through which he claims title. Whatever is sufficient to put a party upon inquiry is, in equity, good notice to bind him. 1 Story's Eq. Jur. 388, and cases cited; 10 Johns. R. 374. If a purchaser has notice of a deed he is bound by all its contents. 2 Sug. Vend. 293, (Am. ed. 340.) A conveyance, with recital of the intent of the purchase, is a conveyance with notice, and the grantee takes, subject to trusts implied, as well as expressed. *Cuyler* v. *Bradt*, 2 Caines, C. E. 326.

5. The statutory lien is valid, although Merrill violated his trust in taking Gridley and Bailey's several notes; because the deed was notice to Wade of the violation of the trust. Wade must, therefore, stand by Gridley's case. Merrill acted, as trustee, to sell, under order of the probate court. The statutory lien is in the nature of a trust upon the land for payment of the purchase-money. A purchaser from the trustee, in violation of his trust, with knowledge, takes, subject to the trust. 1 Story's Eq. Jur. 383, 384, et seq.; 2 Ib. 502–507; Willis on Trustees, 135, 136, 174, 185, (8 Law Library); 1 Hill. Abr. 240, § 64.

6. Even if it were true, as Hoggatt contends, that Wade was justified in believing that Merrill had taken other security than the notes recited in his deed; and that the registration of the

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deed was not constructive notice to Wade of the statutory lien, yet Wade has now such notice of the lien as will bind him.

"Notice before actual payment of all the money, although it be secured, and the conveyance actually executed; or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract." 2 Sudg. Vend. 274, (313, Am. ed.); 3 Peere Wms. 306, 307; 1 Atk. 380; 2 Ib. 630; 3 Ib. 304; 1 Cha. Ca. 34; 2 Freem. 175; 1 Mun. 38, 303; 3 Hen. & Mun. 316; 1 Wash. 41; 1 Johns. R. 288, 301; 7 Ib. 65; *Frost* v. *Beekman*, 1 Johns. Ch. R. 301. See also *Doswell* v. *Buchanan's Executors*, 3 Leigh's R. 365.

7. The sale by Merrill to Gridley and Bailey, for their several notes payable in bank, was reported to the probate court, and confirmed by it. This confirmation was a judgment of a court of competent jurisdiction of the validity of the sale, and of the taking of such notes; and that judgment is final, until set aside by the high court on appeal. Its correctness cannot be inquired into, collaterally, by this, or any other court. It is conclusive, in this suit, of all the objections taken by Hoggatt in this bill.

Quitman and *McMurran*, on the same side.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a bill of interpleader, filed by the appellee Wade, against Hoggatt and Ayres P. Merrill. The ground for coming into equity is, that Merrill, as the administrator of R. Moore, deceased, had sold a tract of land to Horace Gridley; had taken his notes, with surety, for payment, and had retained the statutory lien upon the premises as further security. That Gridley had become insolvent, leaving one of the notes unpaid, and that Merrill, having exhausted his remedy at law, was proceeding to enforce his statutory lien against the land. That the complainant, Wade, had purchased the land of Gridley, and had given his notes therefor; and that one of the notes had been transferred to Hoggatt, who had brought suit upon it. The bill prays that Hoggatt and Merrill might be required to interplead,

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and that the court would determine to whom the amount due from the complainant should be paid, and would grant a perpetual injunction as to the other.

There was an agreement between the parties, that the court should decide the matters in dispute, upon the merits, without regard to technicalities. This agreement makes it unnecessary to consider any mere point of form.

The chancellor decreed that Wade should first pay the amount due to Merrill, and that the balance of what he owed should be paid to Hoggatt, and a perpetual injunction granted against Hoggatt as to the rest of his claim. From this decree Hoggatt appealed.

There is no reason to doubt of the right of Merrill to priority of satisfaction. The statute gives a mortgage upon all real estate sold by executors or administrators. The deed of Merrill to Gridley shows that it was land sold by him as administrator, under an order of the probate court, and that a portion of the purchase-money had not become due, at the time Gridley sold to Wade. Wade was therefore justly chargeable with notice, and could occupy no better position than Gridley.

The circumstances relied on to show a waiver of the lien by Merrill, cannot have such effect. It was his duty to take personal security in addition to the statutory lien; the performance or non-performance of that duty would not affect the lien. Each is intended to be cumulative; and it is doubtful whether anything short of actual payment will discharge the lien. *Elliott* v. *Connell*, 5 S. & M. 91.

Nor is there anything in the transaction with Bailey, which can release the land from the lien. If Bailey had joined in the note, it would still have been bound; he would in equity have been regarded as the surety of Gridley, for his part of the purchase-money, and if he had paid the debt as surety, might have been substituted to the lien of Merrill upon the land.

This statutory mortgage is for the benefit of the estate, and the administrator ought not, by construction, to be held to have done anything to its prejudice. *Baine* v. *McGee*, 1 S. & M. 220.

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The decree, in its details, might be liable to some objections, but substantial justice has been done, and the parties by agreement have requested a decision upon the merits.

The decree is affirmed.

WILLIAM VANNERSON *vs.* JULIUS CULBERTSON.

(The great rule of interpretation of wills is, that the intention of the testator must be ascertained from the language employed, and must be carried into effect if not inconsistent with the rules of law. In seeking for the intention, words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another, can be collected.

Where a clause of a will was in the following words: "I give, devise and bequeath to my beloved wife, Mary Purnell, for her life to her exclusive use, during the term of her natural life, in lieu of her dower and distributive share, in and to my real and personal estate in the state of Mississippi, the mansion-house occupied by us as our residence, and the tract of land on which said house stands, and all the outbuildings, improvements and appurtenances thereunto belonging; together with all the furniture, plate, carriages, horses, mules, stock, garden and farming utensils, servants, slaves and chattels, now used or engaged in and about said dwelling-house and premises, or either of them, and constituting any part of our said dwelling establishment on said premises, or the cultivation of the same; and that upon my said wife's death, said land and mansion-house shall go to my said son Thomas and his heirs;" and there was no other portion of the will affecting the sense of these words; it was *held*, that the wife did not have an absolute interest in the slaves therein bequeathed to her, but took only a life estate in them.

ERROR from the circuit court of Adams county; Hon. Thomas A. Willis, judge of the second judicial district, presiding.

This was an action of detinue, brought by William Vannerson against Julius Culbertson, to recover certain slaves claimed under the will of Levi Purnell. The plaintiff asked the court to instruct the jury as follows: "That by the will of Levi, his wife Mary took an absolute interest or fee simple in the

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slaves therein bequeathed to her." The court refused to give the instruction, and the plaintiff excepted. The whole controversy turned upon the construction to be given to the following clause in Purnell's will:

"I give, devise and bequeath to my beloved wife, Mary Purnell, for her life, to her exclusive use during the term of her natural life, in lieu of her dower and distributive share in and to my real and personal estate in the state of Mississippi, the mansion-house occupied by us as our residence, situated in said county, between one and two miles from the city of Natchez, and the tract of land upon which said house stands, containing about two hundred and eleven acres, and all the outbuildings, improvements and appurtenances thereunto belonging; together with all the furniture, plate, carriages, horses, mules, stock, garden and farming utensils, servants, slaves and chattels, now used or engaged in and about said dwelling-house and premises, or either of them, (the grown servants and slaves being between twenty-five and thirty in number,) and also besides, Walter, and constituting any part of our said dwelling establishment on said premises, or the cultivation of the same; and that upon my said wife's death, said land and mansion-house shall go to my said son Thomas and his heirs."

The jury found for the defendant below; and the plaintiff prosecutes this writ of error.

L. Madison Day, for plaintiff in error,

Contended that the widow was barred of her dower by the devise of the realty, and the limitation on that did not extend to the personalty; *together with* was strictly an appendative *adverb*, and could not, grammatically speaking, transfer the regimen of the preceding clause, except that in relation to the act of giving. He cited, *Hodgson* v. *Ambrose*, Doug. 341; How. & Hutch. 351, § 39; 1 Jarm. on Wills, 432–434; 2 Ibid. 744; Doug. 759; 1 Iredell's Rep. 166–170; 4 McCord's R. 60; *Brewster et al.* v. *McCall's Devisees*, 15 Conn. 274–291; *Lutz* v. *Lutz*, 2 Blackf. 72; 3 Dessaus. 517; *Areson* v. *Areson*, 5 Hill, 410; 7 Blackf. 490; 18 Pick. 537–539; 12 Wend. 602, 660–662.

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The intention must prevail. 6 Peters R. 75; 17 John. 281–288; 1 Munf. 537; 2 How. S. C. Rep. 577, 578; 7 Cond. Eng. Ch. Rep. 305; 2 B. Mon. R. 314–316; 12 Mass. 427; 8 Port. 197; 22 Maine, 257; *Richards* v. *Baker*, 2 Atk. 320–323; 1 Atk. 470.

The testator did not contemplate dying intestate as to any part of his property; this is shown by the preamble of the will and by the very making of the will; and yet no remainder over of this property is made. Cowp. 657–661; 6 Durnf. & East, 277; 7 Blackf. 488, 490; 2 Dessaus. 32, 576; 3 Ibid. 168, 169; 2 How. S. C. Rep. 577, 578; 12 Mass. 427; 1 Call's Rep. 127; 2 Humph. 50; 10 Yerg. 25; *Reeves* v. *Reeves*, 1 Dev. Eq. Rep. 386; *Stehman* v. *Stehman*, 1 Watts, 466, 475; 1 Jarm. on Wills, 769; 1 Mon. R. 27; 2 Dev. Eq. Rep. 391; 17 John. R. 283–289, n. *a.*; 2 Dev. & Batt. 481; 6 Binn. 94; 14 East, 370; 18 Pick. 539; 12 Wend. 660–662; 1 Call, 114; 1 Watts, 466; 2 Dev. Eq. 387; Vaughan, 289; 3 Burr. 1634; 4 Mass. 214; *Sisson* v. *Seabury*, 1 Sumn. 235; 1 S. & M. Ch. 591; Roper on Leg. 453; 2 Dev. & Batt. 479; 4 Hawks. 215; 4 Paige, 115; 9 Ibid. 94; 1 Dana, 206; 1 John. Ch. R. 498; 1 Dev. & Bat. Eq. Cases, 115, 116.

Prentiss and *Bullock*, on same side.

J. F. Foute, on same side,

Insisted that, as there was no remainder over of the slaves and other personalty, it was an absolute bequest to the wife; and relied on the authorities cited by Mr. Day.

J. T. McMurran, for defendant in error,

Contended that a life estate in the slaves was all that was given by the will; that such was only the fair as well as grammatical construction of the language. He cited *Lush* v. *Bennett*, 1 Atk. 470, 471; *Richards* v. *Baker*, 2 Atk. 320, 321; How. & Hutch. Dig. 39, § 29; 6 Peters, 68–78; 2 Wash. Circ. Ct. R. 417; 4 Ibid. 631; *Frederick* v. *Hall*, 1 Vesey, jr. 396; 3 Lomax's Dig. 120, 121; Cowp. 657–661; 6 Durnf. & E. 610–613; 1 Jar. on Wills, 740, § 5, et seq.

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Mr. Justice CLAYTON delivered the opinion of the court.

This case involves the construction of the will of Levi Purnell, deceased. Upon the trial in the court below, the plaintiff asked the court to instruct the jury, "that by the will of Levi Purnell, his wife Mary took an absolute interest or fee simple, in the slaves therein bequeathed to her." This instruction the court refused to give, and the propriety of that decision is the only question for this court to determine.

A great number of cases was read upon the argument, to show what is the true meaning of the will; but unless precisely the same words are used in both wills, and in the same connection, adjudicated cases can give but little aid in exposition. The great rule of interpretation is, that the intention of the testator must be ascertained from the language employed in the will, and must be carried into effect, if not inconsistent with the rules of law. In seeking for the intention, words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another, can be collected. Good faith and common sense alike sanction these rules. 2 Jarman on Wills, 738, et seq.; Lieber's Legal Herman. 120. When there is no ambiguity in the words, there is no room for interpretation.

The clause of the will, which has given rise to the controversy, is in these words: "I give, devise and bequeath to my beloved wife, Mary Purnell, for her life to her exclusive use, during the term of her natural life, in lieu of her dower and distributive share in and to my real and personal estate in the state of Mississippi, the mansion house occupied by us as our residence, and the tract of land on which said house stands, and all the out-buildings, improvements and appurtenances thereunto belonging; together with all the furniture, plate, carriages, horses, mules, stock, garden and farming utensils, servants, slaves and chattels, now used or engaged in and about said dwelling house and premises, or either of them, and constituting any part of our said dwelling establishment on said premises, or the cultivation of the same, and that upon my said

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wife's death, said land and mansion house shall go to my said son Thomas and his heirs."

To our minds there is neither ambiguity nor obscurity in this language. The testator expressly limits the duration of the estate to the life of his wife. If he has made no farther disposition of the slaves, the law makes it for him. He might have known this, and have been satisfied with that destination; or there may be an unintentional omission to dispose of the remainder after the life estate; but in either event, this court can neither supply words, nor add to the plain meaning of those employed. There is no other portion of the will which affects the sense of the words in this clause.

The judgment is affirmed.

HENRY STIER *vs.* JAMES SURGET.

In a suit before a justice of the peace, the only thing he has to determine is, the question of indebtedness, without regard to the technical form of the action. His is not a common law court.

Where the lessor sought to recover on an express agreement to pay rent, it was held to be immaterial whether the lessee occupied or not. At common law, an action of assumpsit may be sustained on an express agreement to pay rent, and the occupancy of the defendant is then immaterial.

In appeals from justices, the circuit court acts as an appellate court; it has only such jurisdiction as the justice had, and the case must be tried *de novo* on its merits. Therefore, where, on an appeal from a justice's court, in a suit upon an express agreement to pay rent, the declaration alleged occupation by the request of the defendant, and by the permission of the plaintiff; and the proof was, that the defendant agreed to pay the plaintiff ten dollars per month for the rent of the premises; it was *held*, that there was no such variance as would affect the merits, and that the court had to try the case upon its merits.

Where there is a variance, the proper course is to exclude the proof; if it is admitted, advantage of the variance cannot be taken in the high court of errors and appeals.

Where the plaintiff claimed twenty dollars for rent of a house and lot,

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and obtained a judgment therefor, and the defendant, on a motion for a new trial, admitted that he owed twenty dollars for the ground-rent of the lot alone, but claimed to own the house himself; it was held, that *merits* were obviously with the plaintiff, and that the controversy as to the ownership of the house, had nothing to do with the rights of the parties in the suit;—a party might, under certain circumstances, become liable for the rent of his own house.

ERROR from the circuit court of Adams county; Hon. Thomas A. Willis, judge of the second judicial district, presiding.

James Surget sued Henry Stier, before a justice of the peace, on a plea of debt, on an account for rent, from the 26th August, to the 20th October, 1844, and recovered twenty dollars and costs. Stier appealed to the circuit court of Adams county. Surget filed a declaration in that court, in which he alleges, that Stier, in consideration that he (Surget), at the special request of said Stier, had permitted him quietly to hold and occupy a certain house and lot under the Hill, in Natchez, from the twentieth day of August, to the twentieth day of October, 1844, which said Stier held and occupied accordingly, promised Surget to pay him on demand so much money as he reasonably deserved therefor; and the plaintiff avers, that he reasonably deserved to have therefor twenty dollars.

Stier pleaded *non assumpsit;* and the jury found for the plaintiff.

Lyman Potter, a witness introduced on the part of the plaintiff, stated, that this cause was originally tried before him, as a justice of the peace; that on trial of said cause before him, the defendant admitted to him, he owed Surget twenty dollars for ground-rent, which he was willing to pay, but not for house-rent. Witness proposed to change the account to ground-rent; but the defendant objected to doing so; upon which he gave judgment against Stier; that Stier said something about being agent for a man by the name of Kneef, or something like it; that he did not live in the house; he was then living on the Hill, in Natchez.

The plaintiff was then introduced as a witness, and stated, that he and others leased the lot in question to O'Conley, at a

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stipulated rent; that O'Conley was to put up a house upon said lot, such as he thought proper, and, at the end of the term, plaintiff would pay him the value of said lot, provided O'Conley paid the rents, which he failed to do, and now owed the plaintiff three or four thousand dollars rent; that plaintiff turned O'Conley out of possession of the property at the end of his term, and rented the house and lot to Stier; that he considered Stier his tenant during the months charged in the account. Stier had not notified him he had left the premises, nor had plaintiff rented to any other person. Plaintiff said he rented the house and lot under the Hill, in Natchez, for which the account sued on was made out in the year 1844, to the defendant, at ten dollars per month, to be paid monthly in advance; that he had not been paid for the two months sued for. Admitted that he did not put up the house on the lot, and that said lot belonged to himself and others, as joint tenants; he believed that the defendant moved on the Hill, before the time for which he is sued for, but he considered it rented to him; that after O'Conley was removed, he rented the ground to Stier; and again in 1844, rented him the house and lot, as before stated.

The defendant was then introduced as a witness, and stated, that he did not occupy the house and lot during the time set forth in the declaration filed in this case; that during those two months, he was living on the Hill, in the city of Natchez, where he now resides; that he had sold out his interest in this house, to one George Kneef, now residing in the state of Virginia; that he, and one Markil, purchased the lease of Nicholas O'Conley, before it expired, with the understanding that he was to get the house, and paid him five hundred dollars in cash therefor; that he never rented said house from plaintiff in his life at any time, but had rented and agreed to pay a ground-rent to said plaintiff for said lot about four years ago, when O'Conley was turned out, and again agreed in the spring of 1843, to pay him a ground-rent monthly in advance for one year, for the same property; that he did not rent the house and lot from plaintiff, in the year 1844, nor occupy it for the time charged in the ac-

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count or declaration; that in August, 1844, he acted as agent for said Kneef, merely to pay rent for him.

This was all the evidence on either side.

Steir asked the court to instruct the jury, that, "if the jury find, from the evidence, that the defendant, Stier, did not occupy the house and lot in plaintiff's declaration mentioned, for the time therein specified, that the law is for defendant, and they must find for him." This was refused; and he excepted. The jury having found a verdict for the plaintiff, Stier moved for a new trial. The motion was overruled; and he prosecutes this writ of error.

Sanders and *Price*, for plaintiff in error.

1. The original process is for a plea of debt; the declaration is in *assumpsit*.

2. The account before the magistrate, was for house-rent; the declaration was for rent of house and lot.

3. The proof does not support either demand. It is clear, that Stier was never a tenant of Surget's; and the proof shows that he owes him nothing.

4. For the variance between the pleadings and proof, the plaintiff below cannot recover. 1 Chit. Pl. 325—328; *Robertson* v. *Lynch*, 18 John. Rep. 117; 3 Stark. on Ev. 1526; Ib. 1548, Tit. *Variance*.

Winchester, for defendant in error.

1. Any objection to pleadings before the justice, cannot prevail; the proceedings before him are informal, without pleadings; and no distinctions of actions are known in his court. How. & Hutch. Dig. 591.

2. Proof of actual occupancy by the defendant, was not necessary. 2 Saund. on Pl. and Ev. 892, and cases there cited; Title "*Use and Occupation;*" 10 S. & R. 251; 7 H. & J. 251.

Per Curiam. This suit was originally brought before a justice of the peace, by Surget, for rent; and the justice gave

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judgment for $20, the amount claimed. An appeal was taken to the circuit court, where a verdict was had in accordance with the previous judgment.

The first objection taken to the proceedings, is, that the action was debt, before the justice; and the plaintiff below declared in assumpsit, in the circuit court. The only thing a justice has to determine, is, the question of indebtedness, without regard to the technical form of the action. His is not a common law court.

Another objection is, to the refusal to give the charge asked, which was, that if Stier did not occupy the house and lot, for the time specified, the jury should find for him. Under the evidence, this charge would have been improper. Surget sought to recover on an *express* agreement to pay rent, and it was therefore immaterial whether Stier had occupied or not. At common law, an action of assumpsit may be sustained on an express agreement to pay rent, and the occupancy of the defendant is then immaterial.

It is also said, the proof varied from the allegation in the declaration. In the declaration, the occupation is alleged, as by the request of defendant, and by the permission of the plaintiff. The proof is, that the defendant agreed to pay the plaintiff ten dollars per month, for the rent of the premises. In appeals from justices, the circuit court acts as an appellate court; it has only such jurisdiction as the justice had; and the case must be tried *de novo* on its merits. This was not such a variance as to affect the merits; and that was the only thing the court had to try. But for a variance, the proper course is to exclude the proof; and no motion to that effect was made. The testimony was admitted without objection.

A motion was made for a new trial, which was overruled. The plaintiff was sworn; and stated that he had agreed to rent the house and lot to defendant, and considered him as his tenant. The defendant was also sworn; who stated that he did not occupy the house during the two months mentioned in the declaration, having sold out his interest to a third person; that he had never rented the house of plaintiff at any time, but

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had agreed to pay him ground-rent for the lot, which he admitted to be due, on the trial before the justice. The defendant claims to be the owner of the house. The matter stands thus: The plaintiff, Surget, claims twenty dollars for rent of a house and lot; the defendant admits that he owes twenty dollars for the rent of the lot alone. The merits then are obvious. The controversy, as to the ownership of the house, having nothing to do with the rights of the parties in this suit. Whether ownership of the house can be separated from the lot, is not now a question. A party might, under certain circumstances, become liable in this form for the rent of his own house.

Judgment affirmed.

DANIEL GREEN *vs.* FLETCHER CREIGHTON, Administrator of Amos Whiting, deceased.

The court of chancery does not possess jurisdiction, at the instance of the creditor of a deceased person, to compel persons who have been at different times his administrators, to file an inventory of the assets of his estate, and to account fully for their actings and doings in their respective administrations, and to pay the complainant's debt; and if there be not assets for that purpose, that the administrator of one of the sureties on the administration bond of the administrator may be compelled to pay it. The settlement of the different administrations was for the probate court; and if liability on the administration bond is to be enforced, it must be through the circuit court.

Where a fraud is practised by an administrator, in his settlement in the probate court, a court of equity, on a bill filed for that purpose, will set aside the settlement and direct a new settlement in the probate court; the jurisdiction of the court of chancery extends no further.

Where an administrator's settlement in the probate court is impeached as fraudulent by bill in chancery, and no proof is offered to sustain the allegation of fraud, which the answer denies, and no proof offered to show that the settlement was made without the notice required by the statute, it will not be disturbed.

Where there is an entire want of jurisdiction of the subject-matter in the

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court, it is never too late, even in the high court of errors and appeals, to object to the jurisdiction of the court; it is only in cases of concurrent jurisdiction that a demurrer to the jurisdiction of the court is requisite.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Daniel Green states in his bill that he is a creditor, in the sum of sixty thousand dollars, of the estate of Amos Whiting, who died in August, 1837; George Lake, and Maria Louisa Whiting, his widow, administered on his estate, and gave James S. McAleb and Robert H. Moore as sureties on their administration bond. In March, 1839, Maria Louisa married Jeremiah M. Rhodes, and they jointly administered until October, 1841. In April, 1841, John D. Freeman, administrator of James W. Sinclair, having a claim against Whiting's estate, impleaded the administrators in the probate court of Claiborne county, to compel them to account for the rents, issues, and profits of the estate of Whiting, and especially of his plantation; but the probate court decreed that his widow was entitled to possession of it in lieu of dower. The proceedings on this petition are set out at length in the bill. Rhodes also filed his annual account with the probate court, which was referred to commissioners, who, at the October term, 1841, reported in its favor, and it was allowed. The bill attacks this account as fraudulent, in numerous items and particulars, and charges Rhodes with having withdrawn and concealed the vouchers to hide his fraud, and with having corrupted the attorney employed to resist the account before the auditors.

At the October term, 1841, McAleb, the surety of the administrators, petitioned for counter security, which not being given, letters *de bonis non* were granted to Fletcher Creighton, who was ordered, out of the assets and property of the estate, to pay a large sum as their commissions to the former administrators; also, the balance found to be due them by the commissioners.

At the November term, 1841, Freeman, as administrator, filed another petition to set aside the order to pay the commissions and balance due on the administration account to Rhodes and

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wife, and attacked their settlement as fraudulent; this petition the probate court dismissed for want of jurisdiction, as Rhodes and wife were no longer administrators, and Freeman appealed to the high court.

Creighton gave as his sureties, on his bond, James S. McAleb and Elias E. Hankisson. In October, 1842, McAleb died, of doubtful solvency; Hankisson was insolvent; so was Creighton; and so, also, was Whiting's estate. Creighton had sold negroes of the estate, and was collecting the money, and would pay, unless prevented, the amounts contained in the decree to Rhodes and wife, which would be wholly lost, if that decree should be reversed.

The bill proceeds to charge Mrs. Rhodes, while sole, with having received, and not accounted for, property of the estate, and charges her with having received thirty thousand dollars' worth of available assets, and with having worked and used sixty-five slaves of the estate, and never having accounted for anything; similar charges are also made against Rhodes; and it is stated, that instead of the estate being in debt to them, on a fair settlement, they are greatly in arrear to the estate.

Mrs. Rhodes had left the state and gone to Maryland, which prevented service of process on her personally in the probate court; and it was the object of the administrators of Whiting to force and procure such delay in the probate court as would prevent any decree against them until it was too late to present that decree against the estate of James S. McAleb, and thus that estate would wholly escape responsibility.

Various other charges are made in the bill touching the conduct of the parties and the course of administration, which need not be noticed. The bill prays that Rhodes and wife, Creighton, Jonathan McAleb, the administrator of James S. McAleb, may be made defendants; may make an inventory of the slaves and property of Whiting's estate, and disclose all the particulars of their knowledge of its affairs, and of their respective administrations of it; may state the history of all sales of its property, account for their proceeds, &c. &c.; may account each of them fully to the chancellor for all their acts of administration; that

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they may be decreed to pay complainant's debt; and if, from the insolvency of the estate, they cannot do it, that Jonathan McAleb, as administrator of James S. McAleb, may be compelled to do it; that a receiver might be appointed to take charge of the slaves and other property of the estate, and that Creighton might be enjoined from paying over to Rhodes and wife the amount decreed in their favor.

The injunction was granted.

Subsequently, an amended and supplemental bill was filed, setting out additional details of the administration and other matters.

Rhodes and wife answered, and denied all fraud in their settlements with the probate court, and plead in bar the final decree of the probate court in their favor. The answer also set up other matters.

No proof was taken on either side, and the chancellor dissolved the injunction. Green appealed.

Crapoo, for appellant.
H. T. Ellett, for appellee.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a bill filed in the superior court of chancery by the appellant. Its allegations are numerous and complicated, and it would be difficult for any abstract to embrace them. Its objects are to compel the several persons, who, at various times have been the administrators of Amos Whiting, deceased, "to file an inventory of the assets of the estate, and to account fully to the court of chancery for their actings and doings in their administration, and that they may be compelled by a decree of the court, to pay to the complainant the amount of his claim, and if there be not sufficient assets for the purpose, then that the administrator of one of the sureties in the administration bond may be decreed to make the payment." These are the leading objects of the bill, though auxiliary matters are also introduced. The court below dissolved the injunction, which had been granted, and from this order the appeal was taken.

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Nothing, certainly, is better settled in this court, than that the court of chancery does not possess the jurisdiction, which it is here asked to exercise. The administration of estates, and the settlement of the accounts of administrators falls peculiarly and exclusively under the cognizance of the probate court. See *Jones* v. *Coon*, 5 S. & M. 751. Suits upon the bonds of administrators pertain to the circuit court. See *Buckingham* v. *Owen*, 6 S. & M. 502. Upon the well defined principles of the law, then, it would seem that there is no error in the decree.

It is alleged, however, that fraud was practised by the administrators in their settlements. If this were true, upon a bill filed to set aside the settlement, a court of equity would have the power to do it, and to direct a new settlement in the probate court. *Turnbull* v. *Endicott*, 3 S. & M. 304. But this would give the court of chancery no power to have the settlement made in its own forum. When it had set aside the fraudulent settlement, and removed it out of the way of the complainant, its functions would be at an end. He must then proceed as if the fraudulent settlement had never been made. In this case there is no evidence to sustain the allegation of fraud. The charge is denied, and no proof is offered to show its existence, or that the settlement was made without the notice required by the statute. *Stubblefield* v. *McRaven*, 5 S. M. 142.

It is said in argument, that there was no demurrer to the jurisdiction of the court below, and that it is too late to raise the objection here. That rule is only applicable in cases of concurrent jurisdiction, and has no place where there is an entire want of jurisdiction of the subject-matter. *Marsh* v. *Haywood*, 6 Hum. 213; 4 S. & M. 549.

On the whole no error is perceived in the decree, and the same is affirmed. But the cause is remanded for farther proceedings, if by the parties deemed expedient, and found within the jurisdiction of the court.

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Nancy Gowan *vs.* Joseph E. Jones.

As a general rule, a sale made by a commissioner in chancery under a decree to foreclose a mortgage, must be reported to the chancellor and confirmed by him, or there must be some act of the parties equivalent to a confirmation before the sale will be valid.

It seems, that great lapse of time would be equivalent to a confirmation by the court of a sale.

In an action of replevin to recover possession of a slave, the plaintiff proved, by the record of the case, that a decree of the superior court of chancery had been rendered against the husband of the defendant for the foreclosure of a mortgage on certain slaves; he also produced a bill of sale of the slave sued for, from the commissioner appointed by the decree to sell; but offered no evidence, that the sale by the commissioner had been confirmed by the chancery court; the defendant asked the court to instruct the jury, that without proof of a confirmation of the sale by the chancery court, they must find for the defendant; *held*, that the instruction was a proper one, and should have been granted.

In error from the circuit court of Simpson county; Hon. Stanhope Posey, judge of the first judicial district, presiding.

Joseph E. Jones brought his action of replevin in the court below, against Nancy Gowan the plaintiff in error, to recover a slave named Eliza; various objections were taken to the pleadings in this court, but as they were not passed upon in the opinion, they are not here further noticed.

The issue was on the plea of not guilty. And the jury found for the plaintiff below.

From the bill of exceptions, it appears that the plaintiff claimed the slave in controversy, under a sale made by R. L. Dixon a commissioner in chancery, under a decree of foreclosure of a mortgage, the slave having been the property of, and mortgaged by Meredith Gowan, whose widow and administratrix the plaintiff in error is.

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The record in the chancery case is made part of the record in this case, by which it appears, that there was a decree of foreclosure, and R. H. Dixon appointed as commissioner to sell the property mortgaged. He never reported his actions to the court of chancery so far as appears by the record; the last step taken being the decree of sale. The evidence that the commissioner did sell and that the plaintiff below purchased, consists of a bill of sale from Dixon and his receipt for the purchase-money; and also the evidence of one Shields, who states that he was present at the sale when Jones purchased the slave, and she was afterwards in plaintiff's possession. He also proves the defendant's subsequent possession.

There is also the evidence of one White to the same effect with respect to the sale by the commissioner, but he adds that he understood the plaintiff's purchase to be for the use of a Mr. Green, and that he afterwards saw the slave in Green's possession.

On motion of the plaintiff, the court instructed the jury,

1. That if the jury believe that the negro sued for is the same which was taken by the defendant and detained by her, and that the legal title and right to possession is and was, at the time of such taking, in the plaintiff, they must find for the plaintiff.

2. That the purchase of the negro under the decree in chancery, on a mortgage made by Meredith Gowan, by the plaintiff, and the payment of the money by him, and the conveyance to him by the commissioner, vests the legal title to said negro in plaintiff.

3. That a mortgage of the negro by Meredith Gowan in his lifetime, and the forfeiture of the condition of the mortgage, divested his title to the same, and no legal title descended to his heirs.

The defendant, after moving instructions which were given, asked the following, which were refused: "That unless they find, from the evidence, that the sale under the decree read to the jury, was reported to the superior court of chancery, and confirmed by the court, they should find for the defendant.

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That unless they find, from the evidence in the cause, that the commissioner Dixon made sale of the slave according to the manner and mode, and upon the notice and terms required by the decree, that such sale is void and confers no title; and if plaintiff has shown no compliance with said terms, and has shown no other title, they should find for defendant.

That the plaintiff must prove property in himself, and unless he has so shown in this cause, they should find for defendant, although she may have shown no title."

After verdict, the defendants moved for a new trial; the motion being overruled, he prosecuted this writ of error.

D. Mayes, for plaintiff in error.

After making various points on the pleadings and the form of the verdict, insisted that,

1. The court erred in giving the plaintiff's first instruction. That instruction refers to the jury, the question both of law and fact, whether the legal title and right of possession was in the plaintiff.

2. The second instruction was wrong; for in it the court decide and instruct as to both fact and law. Taking both the first and second instructions together, the court has clearly decided the whole case, referring nothing to the jury, although in the first, taken alone, the law and fact is all referred to the jury.

3. Unless the sale was confirmed by the chancellor, the plaintiff acquired no title. The whole matter stood open, the bid being but a proposition made to the chancellor, he making the sale by his commissioner, and until accepted by him or until confirmation of the act of his agent, no title passed.

4. If the commissioner did not conform to the decree, did not advertise, &c. the sale would pass nothing. It may be, that if confirmed by the court of chancery, this court would then understand that the essentials of the decree had been complied with. But the instruction proceeds upon the idea, that if the commissioner sold, the title passed, although he had, in every particular, failed to comply with the decree; and, although the chancery court had never confirmed his acts. The power of the commis-

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sioner is a special authority, and to make his acts valid, should, at least in all substantial matters, be pursued.

J. B. Thrasher, for defendant in error, insisted, that the verdict was correct, and should not be set aside. He cited *Barringer* v. *Nesbit*, 1 S. & M. 22; *Jenkins* v. *Whitehead*, Ib. 157; *Lefiore* v. *Justice*, Ib. 381.

Wiley P. Harris and *D. C. Glenn*, on the same side, contended,

1. That substantial justice had been done by the verdict, and it should not be disturbed. Graham on New Trials, 341.

2. That the presumption was, in the absence of proof to the contrary, that the commissioner fairly and fully discharged his duty. *Minor* v. *The President and Selectmen of Natchez*, 4 S. & M. 602.

3. That the objection of the want of confirmation could not avail when thus *collaterally* made; it should have been in a direct proceeding.

Mr. Justice THACHER delivered the opinion of the court.

Joseph E. Jones instituted his action, under the statute of 1842, to provide and regulate the action of replevin, against Nancy Gowan, to recover the possession of a slave. The case is presented in this court, as upon a bill of exceptions to the ruling of the court on the trial, (Laws of 1846, c. 11, § 1,) and upon a motion for a new trial overruled.

The plaintiff below claimed the slave as a purchaser, at a sale made by a commissioner in chancery, under a decree of foreclosure of a mortgage, executed by the husband of the defendant, who is since deceased.

In support of his title, the plaintiff produced in evidence, a certified transcript from the superior court of chancery, of the cause under the decree of which he claimed to have become the purchaser of the slave in question. This transcript concludes with the decree in the cause, and does not exhibit that any report of the sale had been filed, or that any confirmation of the sale

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had been made by the court. The record contains as evidence, a copy of a bill of sale of a slave, made to the plaintiff below by the commissioner of the superior court of chancery, and also his certificate of the payment of a bond executed for the purchase-money of a slave sold under a decree, in the cause whereof, the transcript is introduced in evidence.

Several grounds of error are claimed, but the case will turn upon the refusal of the court to grant a particular instruction, which seems to include the principal points of law embraced in the other instructions. In other respects, there is nothing that, in view of the decision here, demands comment.

The court refused to charge the jury, that unless they find from the evidence, that the sale under the decree read to the jury, was reported to the superior court of chancery, and confirmed by that court, they should find for the defendant.

In chancery, some reports are conclusive, and others require confirmation. Among the latter, is the report allowing the highest bidder at a sale under a decree, to be the purchaser. 1 Smith's Ch. Pr. 358; *Ex parte Minor*, 11 Vesey Ch. 559. In *Tooley* v. *Gridley et al.* 3 S. & M. 514, one of the errors complained of was, that no report of a sale was made to the court. This court said that, "there having been no confirmation of the sale nor anything equivalent to it, the sale under the decree was incomplete, and may be set aside by the court. Confirmation of a report of a sale is usually necessary to its validity." It is not intended here to require the rigid strictness of a confirmation by the court. Parties, by their acts, may cause a confirmation as valid as if made by the court, or, perhaps, great lapse of time may be equivalent to a confirmation by a court. As exceptions to the general rule requiring a confirmation arise, it will be time enough to note them. In the present case, there is nothing presented in the evidence that warrants a deviation from the rule, and the refusal of the instruction asked, was therefore erroneous. The verdict could not have been rendered for the plaintiff below, had the instruction been given.

Judgment reversed and new trial awarded.

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BENJAMIN BOWERS, Executor of Benjamin Bowers, Sen. deceased, *vs.* ANDREW R. JOHNSON.

B. having bought a tract of land of J., assigned in part payment of the purchase-money a constable's receipt for certain notes for collection, and indorsed on the receipt that he would be bound for the same upon the failure of the makers of the notes; J. subsequently sued B. to recover what was yet due on one of the notes embraced in the receipt; on the trial the maker of this note testified that to the best of his recollection he had paid the note to the constable; while the constable testified that he did not recollect that the maker had paid it to him; there was proof that the maker of the note was insolvent when the constable's receipt was assigned to J., and proof also of the constable's insolvency; the jury found for J. for the full amount due on this note; the court below refused to grant a new trial; *held*, by this court, that, although the testimony was not clear, there was not such a preponderance against the verdict as would authorize the court to set it aside.

B. bought a tract of land of J., and took the latter's bond to make title when the purchase-money was paid; in May, 1838, B. assigned certain notes to J. on account of the purchase-money, and agreed that he would be bound for the same upon the failure of the makers; in November, 1840, R. at the request of B., applied to J. for a deed to the land; it was refused, because the purchase-money was not paid; R. told J., if he failed to collect the notes, B. was good, and would certainly pay it to him; upon which J. made the deed, and took up his title bond; in September, 1845, J. sued B. for the residue of the notes unpaid; B. relied on the statute of limitations of six years; *held*, that R.'s promise to J. was clearly a waiver of the statute, and that, even though R. had no authority to make the promise, yet, if B. retained the deed and the land thus acquired, the promise would be obligatory upon him.

No one can hold an interest obtained through the fraud of another, any more than if the fraud were committed by himself; by receiving and retaining a benefit procured for him by the representations of another, he is bound by those representations.

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Bowers v. Johnson.

In error from the circuit court of Tippah county; Hon. Hugh R. Miller, judge.

Andrew R. Johnson, on the 20th of September, 1845, sued Benjamin Bowers, administrator of Benjamin Bowers, sen. in an action of assumpsit; the first count was on this receipt: "Received of Benjamin Bowers one note executed by N. Gordon to Mary Downing, for one hundred and sixty-five dollars, due December 25th, 1837; also one note executed by James D. Cage and N. R. Sledge, for one hundred and eighty dollars, due January 1, 1838, which I promise to collect or return. April 19th, 1838. E. B. Hill, Const." On the back of which was indorsed, "For value received, I assign the within to A. R. Johnson, and will be bound for the same upon the failure of the makers of the notes. May 15th, 1838. B. Bowers, sen." The second count was for the balance due upon a tract of land. The issue was *non assumpsit*. On the trial Wiley J. Riddle proved that the receipt was given in payment for a tract of land sold by Johnson to Bowers; that as agent for Bowers, and at his request, he went to Johnson's house with the latter's title bond, to procure the deed from him to the land for Bowers; on stating his business to Johnson, Mrs. Johnson, his wife, objected to making the deed until all the purchase-money was paid; whether Johnson objected he did not recollect. In order to remove these objections, and succeed in getting the deed, he stated to them both, that Mr. Bowers was bound for the payment of the money; if they failed to collect it before the receipt, Bowers would certainly pay it, as they knew he was very good for it. This seemed to satisfy them, and they then signed the deed. He had no authority from Bowers to make the promise to pay the money; his authority extended only to the getting of the deed. He did not tell Johnson anything of the extent of his authority.

The deed from Johnson to Bowers was then read; it bore date November 20, 1840.

Austin Miller proved that the receipt of Hill was placed in his hands by Johnson for collection, and he held it for several years without being able to collect anything, and returned it to

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Johnson. That Gordon was solvent when the receipt was transferred to Johnson, but Cage was then, and was still, insolvent. Hill, the constable, was also insolvent.

The plaintiff's evidence was here closed. Upon which the defendant notified the plaintiff that he should rely on the statute of limitations. The court charged the jury that the statute of limitations could not apply to the case, because no time was shown from which the statute could commence running. This charge was excepted to. The defendant then read the deposition of E. B. Hill, the constable, who proved that he collected the Gordon note and paid over the money; but did not recollect having received anything on the Cage note.

The deposition of James D. Cage stated that, to the best of his recollection, he had paid the debt; he paid it to E. B. Hill. The plaintiff admitted he had received two hundred and ten dollars on the receipt.

The jury found for the plaintiff a verdict for $244.66. The defendant moved for a new trial, which was refused; he therefore embodied the evidence in a bill of exceptions, and prosecuted this writ of error.

O. Davis, for plaintiff in error.

1. The claim was barred by the statute of limitations. *Little* v. *Blunt*, 9 Pick. 488; *Larason and Happock* v. *Lambert*, 7 Hals. 247; *Kingsbury* v. *Butler*, 4 Verm. 458; 2 Phil. Ev. 136, n. 6; Chit. on Bills, 833; *Crofoot* v. *Moore*, 4 Verm. 204.

2. The verdict was contrary to the evidence; Cage swore that he had paid the debt; there was no proof to the contrary. By a calculation it will be found the sum paid by the constable exceeded the amount of Gordon's debt, and must therefore have constituted a part of Cage's debt.

N. S. Price, on same side, relied on the same points, and cited, on the question of the statute of limitations, *Kinney's Executor* v. *McClure*, 1 Rand. 285.

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T. J. Word, for appellee, insisted,

1. That the statute of limitations did not begin to run in this case until the claims had been prosecuted to insolvency. *States* v. *Edmondson*, 9 Leigh, 473.

2. Riddle's statements took the case out of the statute; the subsequent action of Bowers in receiving the deed, confirmed Riddle's statements on which it was procured, and was a ratification of them.

3. The questions of fact were submitted to the jury; their decision will not be disturbed. *Reed* v. *Wiley*, 5 S. & M. 394; *Barrenger* v. *Nesbitt*, 1 S. & M. 22; *Jenkins* v. *Whitehead*, Ib. 157.

Mr. Justice CLAYTON delivered the opinion of the court.

Bowers, in his lifetime, was indebted to Johnson for the purchase of a tract of land, and transferred to him the receipt of a constable for certain claims, which he was to collect, with a special indorsement, that "he, Bowers, would be bound for the same, upon the failure of the makers of the notes." This was an action of assumpsit brought against him to recover what was due.

One ground of defence was, that the notes had been paid to the constable, and that Bowers was not liable for his default. There was evidence of the insolvency of the constable, and of Cage the maker of one of the notes. One question was, whether that note had been paid or not. There was proof of the insolvency of Cage, at the time of the transfer of the receipt. The constable swore that he did not recollect that Cage had ever paid it, whilst Cage swore that, to the best of his recollection, he had paid it to the constable. The jury found for the plaintiff the sum of $244.66, which appears to be the amount of the note of Cage, with interest. There was a motion for a new trial, which was overruled.

No charge was asked, or given, except as to the statute of limitations. The jury decided the questions of fact, and although the testimony is not clear, yet there is not such a preponderance against the verdict as would authorize us to set it aside.

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The judge instructed the jury, that the statute of limitations presented no obstacle to a recovery. There was no formal plea of the statute, but notice during the trial, that it would be relied on. The transfer was in May, 1838; and this suit was not commenced till September, 1845. To take the case out of the statute, a subsequent promise was relied on. It was in proof that one Riddle, at the request of Bowers, went in November, 1840, to procure a deed for the land. The wife of Johnson, and perhaps also Johnson, refused to make the deed, because the purchase-money had not been paid. Riddle told them, if they failed to collect the money upon the receipt, Bowers was good, and would certainly pay it to them. Thereupon they made no further objection, but executed the deed and took up their title-bond. This was clearly a waiver of the statute. But for this promise, Johnson would probably have retained the title in his own hands, as a means of coercing payment.

But it is said that Riddle was not authorized to make this promise. Even if he were not, it is obligatory upon Bowers, if he retains the deed and the land thus acquired. No one can hold an interest obtained through the fraud of another, any more than if the fraud were committed by himself. By receiving and retaining the benefit, he incurs the obligation. 3 Iredell's Eq. R. 219.

The judgment is affirmed.

JOHN J. THOMPSON *vs.* THOMAS H. WILLIAMS ET AL.

W. and B. filed their bill against J., alleging that A. and O. sold them a tract of land for $4,160, of which $1,200 was paid in cash, and the rest to be paid in twelve, twenty-four, and thirty-six months; the vendors gave a bond to make title when the money was paid; W. assigned his interest in the

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land to N. G. W. and indorsed on the title bond a direction to A. and O. to convey to N. G. W. his interest, when N. G. W. had paid the portion of the purchase-money due by W. Afterwards N. G. W. sold by parol to J., who prevailed on B., his co-tenant in common, to induce A. and O. to convey to J. that portion of the land bought by W. The bill alleges further, that $1,000 of the original purchase-money were still due to A. and O. by W., and prays that the land may be subjected to the payment of it; A. and O. were not made parties to the bill. *Held*, that W. not having paid the purchase-money to A. and O., had no vendor's lien on the land; and that, although he was probably released from his indebtedness to A. and O., by their execution of the deed to J., yet as they were not parties to his bill, he could have no relief against them, and his bill must be dismissed.

APPEAL from the district chancery court at Fulton; Hon. Henry Dickinson, vice chancellor.

Thomas H. Willians and Benjamin Bugg, allege in substance in their bill, that in the month of November, 1836, they purchased sec. 3, T. 12, R. 3, E., of Henry Anderson and Edward Orne for the sum of $4,160, of which they paid, at the time of the purchase, $1,200, and gave their three notes at twelve, twenty-four, and thirty-six months, with interest from date, at eight per cent. for the residue, and took a title-bond from the vendors, to make title when the notes were paid. That in December thereafter, an agreement was entered into between Williams and Bugg, and one Nathan G. Williams, by which Nathan G. took the place of Thomas H. Williams, and the agreement was signed by Bugg and Nathan G. Williams, which agreement divided the land between Bugg and Nathan G. Williams, and bound the latter to pay the liability of Thomas H. Williams to Anderson and Orne, and Thomas H. Williams indorsed the title bond to that effect, and directed Anderson and Orne to make the title to Nathan G. Williams, where he had paid the money due them by Thomas H. Williams, and delivered it to them. That the liability of Thomas H. Williams to Anderson and Orne was not changed, so far as they were concerned, nor had he any showing from Nathan G. Williams that he was to pay the liability of Thomas H. Williams, except the agreement between Bugg and Nathan G. Williams. That Anderson and Orne sued Thomas H. Williams and Bugg, and obtained judg-

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ment on the 15th of November, 1841, for $4,034.83, besides costs, and that that judgment is still in full force against them.

The bill charges further, that Nathan G. Williams, shortly after his purchase from Thomas H. Williams, sold his interest in this land, by verbal contract, to his brother-in-law, John J. Thompson, who went into possession, and still had possession; that various payments had been made by Nathan G. Williams in his lifetime; that he died in February, 1843, intestate. Subsequent to his death, Thompson had made payments, and in May, 1844, Thompson, by falsely and fraudulently representing to Bugg, that he had paid the full amount of Thomas H. Williams's liability, procured a direction from Bugg to Anderson and Orne, to make him (Thompson,) a title to the one half of the section of land, according to the agreement between Nathan G. Williams and Bugg. The bill charges, that upwards of $1,000 is still due from Thompson, as purchaser from Nathan G. Williams, or from the heirs of Nathan G. Williams, on the land, and prays for an account, that Thompson may be decreed to hold the land as trustee for complainants, and that the land may be subjected to the payment of the amount due on the judgment, in favor of Anderson and Orne. The heirs of Nathan G. Williams, and John J. Thompson, are made parties to the suit.

The answer of Thompson admits the allegations in the bill, as to the purchase of the land by Williams and Bugg, but insists that Thomas H. Williams purchased originally, as agent of Nathan G. Williams, and for him. Thompson also admits his purchase, but denies all fraud or misrepresentation in obtaining the deed, and charges, that at the time the deed was made, a settlement was had and a balance struck, and the full amount due from Thompson, as representative, by purchase, from Nathan G. Williams, was paid. It is not deemed requisite to set out the proof. A great deal of it was directed to establish the fact of payment to Anderson and Orne, of the indebtedness of Thomas H. Williams.

The vice-chancellor decreed, that there was a balance due the complainants on the land, which was a lien on it, and for the payment of which it ought to be sold, and as it was uncertain

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what sum was due, ordered the cause to be referred to the clerk of the vice-chancery court, to state an account upon the pleadings and proofs; he reported that the sum of $1,040.58 were due to Thomas H. Williams and Bugg, from the estate of Nathan G. Williams, on the land; and the court confirmed the report. From which interlocutory decree of confirmation, and before a final decree was signed, the defendants appealed.

Bennett and *Featherston*, for appellants.

1. The material allegations in the bill are denied by the answers; it devolves on the complainants to sustain the bill by the testimony of at least one witness, and such corroborating circumstances as are equivalent to a second, or the testimony of two witnesses to sustain it. 1 Phillips on Evid. Cow. & Hill's edition, 154, 155; 2 Story's Equity Juris. 995, 1528; *Smith* v. *Brush et al.* 1 John. Ch. R. 459. This has not been done.

2. The execution of the deed from Anderson and Orne to Thompson, is at least *prima facie* evidence of the payment of the purchase-money.

3. Admitting that the purchase-money has not all been paid, there was error in awarding the sale of the land to pay the debt. Are they estopped by the long possession of Thompson, and their failure to attempt previously to enforce their supposed lien from now enforcing it? 1 Sto. Eq. Jur. 412; 1 John. Ch. R. 344; 6 Ibid. 166.

4. If Anderson and Orne, in violation of the instructions given by Thomas H. Williams, has made a deed to N. G. Williams's vendee, they thereby discharged Thomas H. Williams from his liability to them.

5. It will be said Thomas H. Williams is liable for the whole of the purchase-money, and not one half; if the vendor discharge Thomas H. Williams's liability by the payment of the purchase-money of one half of the section by his vendee, neither Bugg nor Thomas H. Williams can be heard to complain in chancery, as they are not injured by the arrangement.

6. Admitting that Thomas H. Williams is still responsible

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for the half of the purchase-money unpaid by his co-complainant, Bugg, still he is not entitled to a decree as co-complainant with Bugg, but in that event could only be entitled to relief by the allegation of the insolvency of Bugg.

7. If the execution of the deed from Anderson and Orne discharges Thomas H. Williams from liability, any recovery by Anderson and Orne against Thomas H. Williams, without his taking the requisite steps to be relieved, can be no ground of complaint by Thomas H. Williams against Thompson, unless it shall be believed without proof that the deed was procured by fraud.

8. Even if the deed was procured by fraud, it does not become Thomas H. Williams to complain, but Anderson and Orne, upon whom the fraud was practised.

Harris and *Harrison*, on the same side, contended,

1. That where a complainant prays for particular relief, and for other and further relief, he can have no relief inconsistent with the specific relief asked, even though there may be a just foundation for it in the bill. *Pleasants & Co.* v. *Glasscock et al.*, 1 S. & M. Ch. R. 25; *Colton* v. *Ross*, 2 Paige, 396. The decree granted is altogether different from that prayed for.

2. Anderson and Orne were the vendors of the land; they have never transferred their debt for the purchase to any one; no one has ever been subrogated to their rights, but on the contrary, they have conveyed the legal title to Thompson, and claim no lien at all. They are not heard to complain, are not parties to the bill, require no trust to be created for their benefit, and do not ask the court to subject the land or any part of it to the payment of their judgment.

3. It is alleged that Thompson committed a fraud in getting the legal title to the part of the land conveyed to him. Fraud and damage must go together to entitle the party to relief. Thompson did not purchase of complainants, but of Nathan Williams, and there is no allegation that the estate of Williams is unable to pay. The contract between Nathan Williams and Thompson was an absolute sale; and there is no privity be-

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tween complainants and the latter person. Those who represent the estate are content, the original vendors are satisfied, and what right have complainants to follow the land, and to say that it is a fraud upon their rights for the legal title to be made to Thompson?

T. J. Word, for appellees.

"A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage." *Upshaw* v. *Hargrove*, 6 S. & M. 286.

Mr. Justice THACHER delivered the opinion of the court.

Thomas H. Williams and Bugg filed their bill, charging that in 1836, they purchased of Anderson and Orne a tract of land for $4160, paying cash $1200, and making their notes at twelve, twenty-four and thirty-six months, with interest from date, at eight per cent., and received a title bond from vendors. Soon after, Thomas H. Williams assigned his interest in the purchase to Nathan G. Williams, and indorsed upon the title bond a direction to Anderson and Orne, to make a conveyance of his interest to Nathan G. Williams, upon his discharging the liability of Thomas H. Williams upon the notes described in the title bond. Subsequently, Nathan G. Williams made a verbal sale of his interest thus acquired to John J. Thompson, who, in the event, prevailed on Bugg to induce Anderson and Orne to make him a title to that portion of the land originally the property of Thomas H. Williams, as aforesaid. It is a matter of controversy, whether the whole amount of Thomas H. Williams's liability has been liquidated by Nathan G. Williams in his lifetime, or since by Thompson. The bill sets up that $1000 is still due, and prays for an account, and that the land may be subjected to the payment of that amount, in accordance with which the vice-chancellor decreed. The amount of cash payment, $1200, made at the purchase by Thomas H. Williams and Bugg, was derived from Nathan G. Williams, and he has advanced no part of the purchase-money.

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From all the foregoing circumstances, it seems most probable that the remedy of Thomas H. Williams is against Anderson and Orne, resisting the payment of the judgment against him. He certainly is not invested with a vendor's lien upon the land, as against Nathan G. Williams and Thompson, for the very obvious reason that he has not paid the purchase-money to Anderson and Orne, and thus become invested with their equities. But as Anderson and Orne made title to Thompson, in opposition to the terms directed by Thomas H. Williams, and not at his request but at the request of another, he is probably thereby released from his indebtedness to Anderson and Orne, since his directions were that such a conveyance was only to be made upon the full discharge of his liability to them.

In the present aspect of the case, however, Anderson and Orne, not having been made parties, we are obliged to direct this bill to be dismissed.

Decree reversed, and bill directed to be dismissed.

JACOB PRICE, Administrator of Eliza Mitchell, deceased, *vs.* ELLEN MITCHELL, by Elijah Gates, her Guardian.

It seems that where an administrator's account is contested in the probate court by one of the distributees, and it is sought to hold him liable for the services of a slave of the estate for a series of years, as an offset to which, the administrator sets up disbursements for the board and maintenance of the distributee, it is a case peculiarly fitted for the consideration of a jury under the statute (How. & Hutch. 472, § 17, 18,) in the circuit court; yet, if it be otherwise agreed that the probate court shall determine the controversy, and that court does determine it accordingly, its decision, if otherwise correct, will not be set aside.

Where an administrator, to a petition, seeking to make him liable for the hire of a slave of the estate not accounted for in his accounts, plead that the petitioner was not a distributee of the estate, but afterwards filed an answer to the merits of the petition; it was *held*, that the latter answer waived the former plea.

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The charge by an administrator, in his accounts as such, for disbursements made by him for board and maintenance of infant distributees, does not pertain to an administration account, and is not allowable, as a general rule.

Yet where an administrator, in the settlement of his final account, was sought to be held liable by the children and distributees of his intestate, for the hire for a series of years of a slave of the estate of the intestate; and as an offset the administrator charged for sums expended for these distributees, both before and after the grant of letters of administration to him; and it was agreed by the parties, that the probate court should decide the matter, and "in making its decree, should take into consideration the hire of the slave, and also the support of the heirs for the same period of time, and strike the balance;" and the probate court made its decree accordingly upon that basis; it was *held*, on appeal from that decree, that the high court of errors and appeals would not disturb a result which had been brought about by the parties themselves, and the decree must therefore stand.

On appeal from the probate court of Franklin county; Hon. James M. Jones, judge.

Ellen Mitchell, by Elijah Gates, her guardian, excepted to the account of Jacob Price, administrator of Eliza Mitchell, deceased, for final settlement at the March term, 1846, of the probate court of Franklin county. She filed her petition, setting up that Price should be charged with the services of a man slave named Cato, from April 29th, 1839, until the first day of March, A. D. 1845, at the rate of $125 per year. Other matters were also embraced in the petition not necessary to notice. At the April term, 1846, it was agreed by the parties, that the case should be considered at issue, to be tried by the probate court; and at that term, Price plead that the petitioner was not the heir of Eliza Mitchell. To this plea, replication and rejoinder were filed. But without any disposition of this plea, at the same term of the court, Price filed an answer to the petition, setting up that the petitioner and her brother, Josiah Mitchell, were the legal heirs of Eliza Mitchell, and as such indebted to him for board and maintenance, from the first day of April, 1837, to June, 1844, and Josiah Mitchell was indebted to him in like manner.

Thereupon, Elijah Gates was appointed guardian *ad litem* for Josiah Mitchell; and the record then recites as follows:

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"It was agreed between the parties, that the court shall take into consideration in making its decree, the hire of the slave Cato from the first day of January eighteen hundred and thirty-seven; also the support of the said Josiah and Ellen Mitchell, for the same time; and that no claim shall hereafter be made for the hire of said slave Cato, after that time except the controversy now before the court."

Various depositions were taken on either side, and the cause was submitted to the probate court, at the May term, 1846; when that court decreed, that "Jacob Price account for the sum of two hundred and fifty dollars for the hire of the slave Cato, as charged in the said petition, over and above the sum of five hundred dollars, allowed by this court to the said Jacob Price, for the boarding, clothing, medicine and necessaries furnished by him to the said Ellen Mitchell and Josiah Mitchell, being two hundred and fifty dollars for each; the said court estimating the value of the hire of said slave, as charged in the petition, at seven hundred and fifty dollars, and the boarding, clothing, medicines and other necessaries furnished by said Jacob Price to the said Ellen Mitchell and Josiah Mitchell, at five hundred dollars.

Price, feeling aggrieved by the decree, appealed.

J. Marshall, for appellant.

1. The plea was a good bar to the petition. Story's Eq. Pl. § 666, 727; *Porter* v. *Holloway*, 7 How. (Mi.) Rep.; Story's Eq. Pl. 668, and note; it was error, therefore, to award a judgment without disposing of that plea.

2. The probate court had full jurisdiction of the matter and the parties, and as the slave was the property of the heirs, in whatever manner Price was required to account for the slave, his charges for maintaining the wards were legitimate offsets; as the wards, in any event, would obtain the money. *Magee* v. *Ford*, 5 S. & M. 769.

3. The proof shows, that the allowance of the five hundred dollars was a capricious estimate, and made, without data or regard to the proof, by the judge below; the offsets were legal,

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and greatly exceeded the petitioner's demands, and should have been allowed in extinguishment of them.

Montgomery and *Boyd*, for appellees, replied,

1. That the voluntary answer overruled the plea, and was an admission of heirship.

2. That the administrator had no right to charge for maintenance and money expended for the wards. His whole offset ought to have been rejected; the appellees were the only ones to complain of the decree; they did not do it, and the appellant certainly could not.

3. The proof sustained the decree so far as the court had the right to make such a decree.

Mr. Justice THACHER delivered the opinion of the court.

This is an appeal from the probate court of Franklin county.

Ellen Mitchell, a minor heir of Eliza Mitchell, deceased, by her guardian, filed exceptions to the settlement of Jacob Price, administrator of the estate of Eliza Mitchell, claiming that the said Price had failed to account for the services of a certain slave, which he had enjoyed for the term of six years. It was agreed that the issue should be tried by the probate court. There was filed a plea that the petitioner was not the heir of the administrator's intestate, but this ground of defence was subsequently waived by the administrator filing an answer to the merits of the petition. Another heir of the intestate, a brother of the petitioner, was also united in the petition. The answer of the administrator, in the main, sought to set-off the claim by a charge for disbursements and expenses for the board and maintenance of the heirs. Proofs were taken, and the court in its decree allowed the whole amount charged for the services of the slave, but allowed that sum to be credited with the sum of five hundred dollars, as so much disbursed by Price for the use of the children, and thus decreeing the sum of two hundred and fifty dollars against the administrator.

In the first place, it may be observed that this case was peculiarly one fitted for the consideration of a jury, and under

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the statute (H. & H. 472, § 17, 18,) the complainant in the probate court could have insisted, that the issue should have been tried in the circuit court, but it was otherwise agreed that the probate court should determine the matter in controversy. The decision of the question of fact was, therefore, by the consent of parties, submitted to that tribunal.

Next, the defence of the administrator, in strict law, was insufficient, and, under any other circumstances, should have been rejected altogether. An account, charged by an administrator, for board and maintenance of infant distributees, does not pertain to an administration account. *Green* v. *Green*, 3 S. & M. 526; *Jones* v. *Coon et al.*, 5 Ibid. 751; *Washburn et al.* v. *Phillips*, 5 Ibid. 600. The set-off also was a mixed account of charges alleged to have been warranted by expenditures, incurred for the heirs as well before as after this grant of letters of administration. But all these difficulties as to the legitimacy of the evidence, seem to have been, to some extent, obviated by an agreement in the record, that the probate court "in making its decree, should take into consideration the hire of the slave, and also the support of the heirs for the same period of time, and strike the balance." The cause presents much the appearance of an arbitrative submission, and even viewing it as a finding of a jury upon the evidence, the preponderance of evidence is not so great against the decree as to call for a reversal in this court. Indeed, by the terms of the submission, it would seem that Price was to be looked upon as a *quasi* guardian, without which his defence, in the nature of set-off, could not have been admissible. Therefore, considering the case altogether, we are inclined not to interfere in a result which has been brought about by the parties themselves.

Decree affirmed.

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JOHN PARKER *vs.* ROBERT KELLY ET AL.

The vendor of land has a lien for the purchase-money, whether he makes a deed or gives bond for title; in the latter case the retention of title by the vendor is, in effect, the same thing with conveying the title and taking a security for the purchase-money by mortgage; and any assignment by the vendor, who has merely given bond to make title on payment of the purchase-money, of the notes given by the vendee for that purchase-money, will pass to the assignee all the rights of the vendor.

And when the vendor, who has given a bond to make title on payment of the purchase-money, and has received notes from his vendee for that purchase-money, payable at stipulated periods, assigns one of those notes, and subsequent to such assignment, makes an absolute deed to his vendee of the land, the lien of the assignee on the land, for the satisfaction of the notes he holds, will not be thereby lost; he may still, in equity, subject the land to the payment of the note.

And where, after a vendor who had given a bond for title, and assigned one of the notes for the purchase-money, has also subsequently given his vendee a deed for the land, a judgment-creditor of the vendee, who has recovered his judgment since the deed was made to the vendee, will be postponed in his right to satisfaction of his judgment out of the land, to the equitable right of the assignee of the note for the purchase-money; the judgment will be a lien on the *legal title* of the vendee, subject to the equitable lien of the assignee, and when the latter is satisfied, the judgment will hold.

A release by an assignor of his assignee's claim, is a nullity.

A court of equity has jurisdiction to enjoin a sale under execution at law, on the application of an equitable incumbrancer, who has a prior equitable lien, to the lien of the judgment; and when the court has taken cognizance of the matter, it will adjust all the rights of the parties.

Where, therefore, a vendor had given a bond for title, and assigned one of the vendee's notes for the purchase-money, and then made the vendee a deed; and afterwards a judgment had been rendered against the vendee, and the land was about to be sold under execution thereon; it was *held*, that a court of equity had jurisdiction at the suit of the assignee to enjoin the sale under the execution, and to adjust all the rights of the parties, by decreeing satis-

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faction out of the land, first to the assignee, and afterwards to the judgment creditor.

A lien cannot be displaced but by some act of the party holding it, which shall postpone him to a subsequent claimant.

On appeal from the decree of the superior court of chancery; Hon. Robert H. Buckner, chancellor.

On the 20th day of February, 1840, James Kelly, William Kelly and Robert Kelly, partners under the firm of J. & W. Kelly & Co., and Needham Stevens and John Stevens filed their bill, in which they allege that Needham Stevens, in 1836, sold to Robert E. Beatty about sixteen hundred acres of land lying in Panola county, for $25,000, and the latter gave his notes without security, for the payment of the purchase-money; on the 21st of August, 1838, all the purchase-money being unpaid but $7,000, Needham Stevens conveyed the land by [illegible] warranty in fee simple to Beatty, to enable the latter to put it in the Union Bank to take stock; when this deed was made, Beatty gave no new or other security for the purchase-money.

That one of the notes for the purchase-money for $5000, belonged to Kelly & Co.; one for $5000 to John Stevens, and one for $3000 to Needham Stevens; Beatty was insolvent, and the land the complainants' only security for the debt.

That on the 23d of April, 1839, John Parker obtained a judgment against Beatty for the sum of $13,983.45, and had levied on the land.

The bill prayed for an injunction against the sale under the execution, that it might be perpetuated and the land be subjected to sale to pay the claims held by complainants.

The notes, and the record of the judgment obtained in February, 1840, in favor of Kelly & Co., on the note held by them, were filed with the bill. So, also, were the title-bond and deed to Beatty. The condition of the former was, (after reciting the sale of the land,) as follows: "When said Needham Stevens makes or causes to be made a warrantee deed unto the said R. E. Beatty for said land, this bond will be null and void, otherwise to remain in full force and virtue."

On the 21st of April, 1841, William B. Pollard was ordered

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to be made a party complainant, and filed a supplemental bill, claiming to be a holder of one of the notes for the purchase-money, and insisting on his right to satisfaction of it out of the land.

At the same time, Kelly & Co. filed an amended bill, setting up, that in May, 1839, they had obtained a judgment against Stevens on his indorsement of Beatty's bond; that Beatty on the 4th of March, 1840, conveyed by deed the land in controversy to them, from a sense of justice to them; this deed, they insist, united with their equity, and the fact that their note has been reduced to judgment, gives them a prior lien to Parker. They state, also, that Parker's judgment was founded on an indorsement of Beatty, made anterior to the deed from Stevens to Beatty.

Parker's answer admits, in substance, most of the allegations of the complainants, but denies that Needham Stevens owns any of the bonds of Beatty, and insists, that by his transfer of these bonds, and the execution of the deed to Beatty, he lost, and so have his assignees, all lien on the land, and is thus subject to his judgment.

Kelly & Co., in July, 1842, on leave, filed an amended bill, in which they allege, that in December, 1837, the bond of Beatty was assigned to them by Stevens, who designed, by the assignment, to pass to them his equitable lien. That the deed to Beatty was given without their knowledge or subsequent sanction. That when Stevens made this deed, he had no intention to waive his vendor's lien, but, on the contrary, expressly reserved it. The object of the deed was to enable Beatty to put the land in the Union Bank, raise money on it by mortgage, and thus pay off the notes for the purchase-money; and that Beatty wholly failed to get the stock, or raise the money, and they insist the lien was never relinquished.

To this amendment, Parker replied, in substance, that he admitted none of its allegations, and called for proof; denied that the note assigned to Kelly & Co. was assigned in consideration of the lien on the land, or with a view to it, but alone on the credit of Beatty, who was then reputed wealthy; insists,

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that by the transfer to Kelly & Co. the vendor's lien was lost, and was also extinguished by the deed to Beatty.

Beatty's deposition was taken. He proved that it was agreed between Stevens and himself, when the former gave him the deed to the land, that he should retain his lien for the purchase-money; and the deed was executed upon the understanding, that this lien should continue until either personal security was given, or the money obtained from the bank; and was made to render Stevens's claim more secure, not to weaken it; he did know Kelly & Co. when the deed was made.

He also testified, that the draft on which Parker's debt was founded, was a forgery of his name by the drawer, and that he had no knowledge of, or part in its execution.

J. T. Trezivant testified, that in December, 1837, Stevens, being in debt to Kelly & Co., transferred to the witness for them the note of Beatty, assuring him it would certainly be paid at maturity, as the land for which it was given was bound by it; the title was yet in him, and Beatty could get no deed until he had paid the purchase-money, and was besides rich.

J. C. Armstrong proved the same facts in substance.

The depositions of other witnesses were taken, to prove that Stevens stated, after he made the deed to Beatty, that he regarded Beatty as perfectly good for the money, and looked to him personally, and not to the land.

On this state of pleading and proof, Parker moved to dissolve the injunction; the chancellor overruled the motion, and he appealed to this court.

The cause was argued in this court at a former term, when the court delivered an opinion, affirming the decree of the chancellor. A reargument was applied for, and ordered at the present term of the court.

George S. Yerger, for appellant, insisted,

1. That the law was settled, that a vendor's lien should not prevail against his judgment creditors, or creditors by mortgage. *Gann* v. *Chester*, 5 Yerg. R. 205; *Semple* v. *Burd*, 7 Serg. &

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Rawle, 286; *Bayley* v. *Greenleaf*, 7 Wheat. 46; 4 Kent's Comm. 151.

2. Even if the trust passed with the note, the parol lien was not recorded, and is void as to creditors or purchasers without notice. How. & Hutch. 343, § 3, 5; 5 Yerg. 205; 7 Serg. & Rawle, 293; 4 Kent's Comm. 162.

3. A mere equitable lien cannot be assigned; but even if the lien of Stevens were more, were a trust, it was yet but a mere security, a secret trust — giving no notice in itself, unrecorded; not capable of being discovered by the most diligent search; and therefore not operative as against those having no notice of it. *Roberts* v. *Salisbury*, 3 Gill & John. 425; *Johnson* v. *Cawthorn*, 1 Dev. & Bat. Eq. Ca. 35; *Harper* v. *Williams*, Ib. 379.

Shelton, on same side.

1. The vendor's lien is lost when he makes a conveyance of the land, inconsistent with the retention of the lien; a mortgage for bank stock was of that nature. 1 Mason, 218; 15 Vesey, 350; 7 Serg. & Rawle, 84; 4 Wheat. Rep. 285; *Clowes* v. *Rawlings*, 9 S. & M. 127.

2. On the facts in this case, Kelly & Co. had no lien. Mr. Shelton elaborated this point, and cited 6 How. (Mi.) Rep. 362; 4 S. & M. 294; 2 J. R. 272; 5 Ib. 78; 5 How. (Mi.) Rep. 465 — 467; 3 Ib. 321; 20 J. R. 16; 1 Saund. Rep. 320, n. 4, 320, n. *a.*; 1 Meigs's Rep. 52; 5 Yerg. R. 205; Ib. 295; 3 Ib. 27.

3. Admitting, Kelly & Co. had a vendor's lien, it is postponed to the lien of Parker's judgment; the latter is an express lien of record, the former implied, and will be postponed to the latter. 7 Wheat. R. 46; 7 Serg. & Rawle, 82; 1 Dev. & Batt. 35; Ib. 379; H. & H. 343; 1 S. & M. 206.

4. The injunction should, at least, be dissolved as to the *excess* of the value of the land above the amount of the judgment.

William and *William G. Thompson*, and *D. C. Glenn*, on the same side.

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William Yerger, for Stevens, made the following points, and discussed them at length.

1. That Stevens had the right to enforce the vendor's lien upon the land against Beatty. On this point he cited 2 Story's Eq. 463, et seq.; *Clower* v. *Rawlings*, 9 S. & M. 127; 2 Story's Eq. 470; 1 Bland, 523; 1 Paige, 30.

2. That Parker occupied no better position than Beatty. He cited 9 Vesey, 96–99; 2 Vesey & Beames, 308; 1 Paige, 128; 1 Peere Wms. 278; 1 Paige, 129; 2 Ib. 217; 4 Ib. 9; 2 Story's Eq. 481.

L. Lea,* for Kelly & Co., insisted on their right to subject the land to the payment of the note of Beatty held by them. He cited and commented on *Mackreth* v. *Symmons*, 15 Ves. 329; 1 Paige, 30; 4 Kent, 153; 1 Story's Eq. 481; 5 Humph. 569; *Tanner* v. *Hicks*, 4 S. & M. 358; Sug. on Ven. 392; 9 Cow. 318; *Upshaw* v. *Hargrove*, 6 S. & M. 286; *Burnett* v. *Dunlap*, Op. Book, 29; S. C. 5 S. & M. 702; Prec. in Ch. 478; 1 Peere Wms. 278; 4 Hen. & M. 143; *Moreton* v. *Harrison*, 1 Bland, 498; *Briggs* v. *Hill*, 6 How. (Mi.) R. 362; *Graham* v. *McCampbell*, Meigs, 52; 5 Humph. 489; *Terry* v. *Woods*, 6 S. & M. 139; *Keirsted* v. *Avery*, 4 Paige, 9; *Duval* v. *Bibb*, 4 Hen. & Mun. 113; *Goodwin* v. *Anderson*, 5 S. & M. 730; *Conrad* v. *Atlantic Insurance Company*, 1 Peters, 441; 2 Story's Eq. 487; *Sanford* v. *McLean*, 3 Paige, 123; *Hildreth* v. *Sands*, 2 Johns. Ch. 50; 10 Peters, 175; *Coutts* v. *Walker*, 2 Leigh. 268; 2 Story's Eq. 481, 596; 5 Humph. 26; *Baird* v. *Kirtland*, 8 Ohio, 22; *Riddle* v. *Bryan*, 5 Ohio, 55; *Rutherford* v. *Green*, 2 Iredell's Eq. 121; *Tomlinson* v. *Blackburn*, Ib. 509; *Sanford* v. *McLean*, 3 Paige, 123; 4 Ib. 9; *Sweat* v. *Henson*, 5 Humph. 49.

* Mr. Lea submitted with his argument a brief of the Hon. A. M. Clayton, filed before the chancellor, in behalf of Kelly & Co. It is, in the opinion of the reporter, of such ability and research, on the subject of the vendor's lien, as to entitle it to preservation, in its original shape. He is unwilling to abridge or compress it; and has accordingly published it entire, in an Appendix to this volume, where it will be found. R.

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Watson and *Walter*, on the same side, replied to the arguments for appellant, and cited and commented on *Dollahite* v. *Orne*, 2 S. & M. 590; *Terry* v. *Woods*, 6 Ib. 139; *Money* v. *Dorsey*, 7 Ib. 15; *Goodwin* v. *Anderson*, 5 Ib. 730; *Walker* v. *Gilbert*, 7 Ib. 456; Ib. 630-650; 8 Ib. 742; *English* v. *Foote*, Ib. 451; *Clower* v. *Rawlings*, 9 Ib. 127; *Duval* v. *Bibb*, 4 Hen. & Mun. 113; *Dunlap* v. *Burnett*, 5 S. & M. 702; *Upshaw* v. *Hargrove*, 6 Ib. 292; *Dixon and Starkie* v. *Lacoste*, 1 Ib. 70; 7 Ib. 586; 7 How. (Mi.) R. 375; Walk. 389; *Gillespie* v. *Bradford*, 7 Yerg. 170, and the other authorities cited by appellant.

Mr. Justice THACHER delivered the opinion of the court.

This is an appeal from a decree of the superior court of chancery, disallowing a motion to dissolve an injunction to stay an execution at law.

In 1836, Stevens sold to Beatty 1600 acres of land for $25,000. Upon this contract of sale, Beatty paid, in cash, $7000, and gave his four notes for the remainder of the purchase-money, and Stevens executed to Beatty a bond to make title, in a penalty of $50,000. The title was not to be made until the payment of the purchase-money. In 1837, Stevens assigned to Kelly & Co. one of the above four notes, amounting to $5000. In 1838, Stevens conveyed the land absolutely to Beatty. In 1839, Parker recovered a judgment against Beatty for $13,983, and levied his execution upon the land in question, and the bill in this case was filed by Kelly & Co. to enjoin Parker from selling the land under his execution. A supplemental bill was likewise filed by Pollard, claiming to be an assignee of another of the notes, but it does not appear in evidence that this assignment was made anterior to the conveyance from Stevens to Beatty. It is shown, also, that in 1840, Beatty executed a conveyance of the land to Kelly & Co.

The questions to be decided are, whether Stevens had a lien upon the land for the purchase-money, and one prior to the lien of Parker, the judgment creditor of Beatty; and, whether the assignment of the note by Stevens to Kelly & Co., before his

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execution of the deed of conveyance to Beatty, was a transfer of the lien to them, and thereby prevented the sale of the land by Parker, under his execution.

The leading principle governing a vendor's lien has been recognized in the court in accordance with the settled doctrine upon that subject. The general rule is, that the vendor has a lien for the purchase-money. 15 Ves. 329; 5 Monr. 299; 7 Wheat. 49; 5 Humph. 569; 2 Green. Ch. (N. J.) 397. In *Tanner* v. *Hicks et al.* 4 S. & M. 300, it is laid down that the retention of title by the vendor upon a sale, is in effect the same thing with conveying the title and taking a security by mortgage; and, that the assignment of the debt due for the purchase-money invests the assignee with all the rights of the vendor. The same principle was reiterated in *Terry et al.* v. *Woods et al.* 6 S. & M. 149. Under these decisions, therefore, there can be no question either as to the efficacy or priority of Stevens's lien upon the land, or of his right to transfer his lien in its full force by an assignment of the debt due for the purchase-money, or any portion of it, at any period before the date of his conveyance in fee to Beatty.

The remaining, and indeed real inquiry in the case is, whether the fact that Stevens made the conveyance of the lands to Beatty, but after his assignment of Beatty's note to Kelly & Co., affected the lien already there vested by law in Kelly & Co.

It is a universal rule that a lien cannot be displaced but by some act of the party holding it, which shall postpone him, in a court of law or equity, to a subsequent claimant. It is clearly settled that any release by an assignor of his assignee's claims, is a nullity. 9 Cow. 34; 3 Johns. 426. As has been seen, Kelly & Co., substituted for and holding the original attitude of Stevens, were, in point of law, mortgagees of the land, and it inevitably follows that their interests were no longer in the power of Stevens, nor could they become affected by any act of his. The conveyance by Stevens to Beatty passed an estate incumbered already by Beatty himself, and it was not within the capacity of Stevens to both receive the amount of

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Beatty's obligation to him upon the contract, and subsequently release Beatty from that obligation to him, at a time when the power to control it had passed out of his hands. Kelly & Co. had a prior equity, which must be protected on the authority of the case of *Tanner* v. *Hicks*, 4 S. & M. 294. But Parker recovered a judgment against Beatty, whilst the legal title was in Beatty. Parker's judgment is therefore a lien on the legal estate, subject to Kelly & Co.'s equity, and he is of course entitled to the residue in preference to Stevens, if any interest remains in him, after Kelly & Co. are satisfied in the amount of their equity. As the matter is in equity, the rights of the parties can there be adjusted.

The decree of the chancellor is therefore affirmed, and the cause remanded for further proceedings.

Mr. Justice CLAYTON having been of counsel below, gave no opinion.

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HENRY KEITHLER *vs.* THE STATE OF MISSISSIPPI.

The law which authorizes the circuit court to appoint a district attorney, to supply the temporary absence of that officer, is not unconstitutional; although the constitution makes the district attorney elective, yet if he be not in attendance to discharge his duties, the state has a right to employ other counsel to discharge them for him; and when so discharged, they will be valid.

Express power is conferred by the constitution, (Art. 5, § 13,) upon the legislature, to provide for the filling of all vacancies not therein provided for; under this power, it seems that if the absence of the district attorney causes even a temporary vacancy, it may be provided for by the legislature.

It seems that the signature of the district attorney, is not essential to the validity of an indictment; it is not by the common law; nor is it made so by any statute in this state; while it is a practice for them to sign indictments, and one that should be followed, yet it is not indispensable; and an indictment duly preferred by the grand jury, will be valid, though without

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the signature of the district attorney, or it seems with the name of one signed to it, who was not the legal district attorney; if it were otherwise, the district attorney could never be prosecuted for any offence.

Under the statute of this state, which provides that no conviction for any offence, excepting perjury and subornation of perjury, shall disqualify, or render such person incompetent to be a witness in any cause, civil or criminal, but the conviction should only go to his credibility, it was *held*, that a principal, found guilty of murder, and *condemned to be hung*, was a competent witness against a person indicted as an accessory before the fact, to the same murder. The statute was designed to remove a disability; mere *conviction* never disqualified; it was the *judgment* which disqualified; the statute must, therefore, be considered to have reference to the *judgment*.

Since this statute, removing the infamy, a condemned principal may now testify against his accessory.

On the trial of a prisoner indicted as an accessory to murder, the record of the conviction of the principal, is evidence to prove that conviction, and all its legal consequences, though not evidence of the fact of the guilt of the prisoner.

The following caption to the record of the conviction of a principal in murder, was held to be sufficient, when the record was offered in evidence, on the trial of the accessory, to wit: "Pleas and proceedings had and done before the Honorable George Coalter, judge of the third judicial district, of the state of Mississippi, at a circuit begun and held in and for Hinds county, at the court thereof, in the town of Raymond, on the third Monday of November, A. D., 1846, it being the sixteenth day of said month."

The following certificate of the clerk of the court in which a principal in murder was convicted, attached to the record of the conviction, was held to be sufficient to make the record evidence on the trial of the accessory, to wit: "The state of Mississippi, Claiborne county, *ss*. I, Dan McDougall, clerk of the circuit court, in and for the county and state aforesaid, do hereby certify that the foregoing sixteen pages and this page contain a full and perfect transcript of the papers, in relation to the change of venue from Hinds county, now on file in my office, as well as of the papers now on file in my office, in relation to proceedings in this court, and also a perfect transcript of all proceedings had here in the case stated, to wit: *The State of Mississippi* v. *Jack Fountain Silas*, charged and convicted of the crime of murder, and sentenced as set forth in said transcript, as full as the same appears of record in my office. Given under my hand and seal of office, &c."

The circuit judge, on the trial of a person charged with crime, has the right to modify the instructions asked of him in behalf of the state or prisoner, and to give that modification *verbally;* and if the prisoner objects to the modification, he must except to it at the time, and embody the modification in a bill of exceptions, that the high court may judge of its propriety;

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if he omit to do this, and permit the jury to retire, it will be too late to object to it afterwards, and it will not be error for the judge, to refuse to call the jury back and repeat the modifications to them, nor to refuse to allow the modifications when written out by the judge after the retirement of the jury, to to be sent in to the jury, although the prisoner's counsel stated, that they understood the verbal modifications given to the jury, to be different from those written out by the judge; the latter, however, stating that they were literally the same.

The law of 1846, on the subject of charges by judges to the jury, does not, it seems, apply to criminal trials; yet if it did, that provision in it which requires that the charges or modifications must be in writing, unless *by the consent of both parties*, covers the case of modifications given *verbally*, which the record does not show, were objected to at the time; in the absence of objection appearing on the record, assent will be presumed.

On the trial of a prisoner, charged with being an accessory to murder, the court instructed the jury that, "it made no difference to the merits of the case, whether the principal conceived the design to kill the deceased before his interview with the prisoner or not, if the prisoner encouraged him in the design, by falsely stating to him threats of the deceased, the prisoner was guilty;" *held*, that the instruction was not erroneous; it was to be taken in connection with the evidence; and the instruction in terms embraced the idea, that the prisoner knew of the design of the principal, for he could not encourage him in a design of which he had no knowledge.

Where, on the margin of an instruction of the court, embodied in the record, was written the word *refused*, yet the body of the bill of exceptions recited that the instruction was *given*, it was *held*, that the latter recital must prevail.

Where, on the trial of an accessory to murder, the principal after his conviction testified, and the jury found the accessory guilty, and it appeared on the trial, that the principal had made contradictory statements, and the circuit judge refused to grant a new trial; it was *held*, by the high court of errors and appeals, that while the evidence of an accomplice was to be weighed with great jealousy and distrust by a jury, yet his *credibility* belonged exclusively to the jury, and it would be a delicate point for a court to touch it; it would be impossible, as a question of law, to say that he should not be believed; the jury are to determine that from his manner, consistency and other attending circumstances; they are to judge how far his testimony has been corroborated, or they may believe him without corroboration.

A voluntary confession is entitled to but little weight, as it is but natural, that one accused of crime should endeavor to palliate his guilt by excuses; and if a different statement should be afterwards made under oath, when circumstances have changed the condition of the party, it will be with the jury to say, whether they will disbelieve him on account of such discrepancies.

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In this case, the prisoner was indicted as an accessory to murder, and found guilty; the principal, being convicted, was a witness on the trial, and swore positively to the guilt of the prisoner; but as he had made contradictory statements, and his testimony in part, was contradicted in other particulars, the court entered into an elaborate examination of the other testimony in the case, and after a review of it came to the conclusion, that whilst there were powerful reasons to question the credibility of the principal, yet the verdict was not given without corroborating circumstances, and must stand.

In error from the circuit court of Hinds county; Hon. George Coalter, judge.

A grand jury, regularly impanelled at the November term, 1846, of the circuit court of Hinds county, preferred a joint indictment against Jack Fountain Silas as principal, and Henry Keithler as accessory before the fact to the murder of Benjamin G. Sims, on the 6th day of July, 1846. The indictment was signed "J. E. Sharkey, district attorney, *pro tem.*, 3d judicial district."

Silas, by affidavit, procured a change of venue to Claiborne county in his case.

At the May term, 1847, of the circuit court for Hinds county, the case of Keithler came on for trial; the state was represented by Fulton Anderson, Esq. the district attorney of the district; the prisoner plead *not guilty;* out of the special *venire* previously summoned, a jury was impanelled on the 4th day of June, 1847, and after a trial of two days, the jury found the prisoner "guilty in manner and form, as charged in the indictment;" and the judge sentenced him to be hung on the 21st day of July, of that year.

From the bill of exceptions, sealed on the refusal to grant a new trial, the following facts appear.

The record from the Claiborne circuit court of the conviction of Silas as principal, was read to the jury. It was objected to, but the objection overruled. The caption of the record was in these words, viz.: "Pleas and proceedings had and done before the Hon. George Coalter, judge of the third judicial district of the state of Mississippi, at a circuit begun and held in and for Hinds county, at the court thereof, in the town of Raymond,

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on the third Monday of November, A. D., 1846, it being the sixteenth day of said month." The record proceeded then to state the impanelling of the grand jury, and the preferment of the joint indictment in Hinds; the arraignment and plea of not guilty by Silas; the change of venue to Claiborne county on Silas's affidavit; the issuance of a special *venire;* the impanelling of a petit jury in the Claiborne circuit court, before the Hon. Stanhope Posey, judge, on the 14th of April, 1847; the verdict of the jury of *guilty*, on the same day; and the sentence of the court that he be hung on the 4th day of June, A. D., 1847.

This record was certified in these words, viz.: "The state of Mississippi, Claiborne county, ss. I, Dan McDougall, clerk of the circuit court in and for the county and state aforesaid, do hereby certify that the foregoing sixteen pages and this page, contain a full and perfect transcript of the papers in relation to the change of venue from Hinds county, now on file in my office, as well as of the papers now on file in my office in relation to proceedings in this court, and also a perfect transcript of all proceedings had here, in the case stated, to wit; the state of Mississippi versus Jack Fountain Silas, charged and convicted of the crime of murder, and sentenced, as set forth in said transcript, as full as the same appears of record in my office.

"Given under my hand and seal of office this 3d day of June, A. D. 1847. Dan McDougall, clerk."

The counsel for the state then offered as a witness in behalf of the state Silas, who had been sentenced to be hung on that day, without having produced to the court any pardon or respite of the sentence of the Claiborne circuit court; this was objected to by the prisoner, but the objection was overruled.

Silas testified that he became acquainted with Keithler in Vicksburg, and from the first felt a strong attachment for him; Keithler was in the employ of Benjamin G. Sims, at the latter's mill, and employed Silas to oversee for Sims; and he accordingly acted as Sims's overseer. Up to the time of his (Silas's) separation from Sims, on the Sunday that he left his employment, nothing had occurred between Sims and himself; they

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were friendly. On the Sunday on which he left Sims, the following conversation occurred between them. On the Saturday previous, a horse Silas was in the habit of riding was discovered by him to be locked up; Silas had heard that Sims had heard that he (Silas) had been riding this horse at night; on this Sunday, Sims said he had not been told so, but that he was ready to settle with Silas; the latter told Sims he would not come to a settlement with him unless he would settle for the whole year, upon which Sims told him to leave his premises. The witness continued his deposition as follows: "At that time I did not know the cause of difficulty between Sims and myself. I felt as friendly towards him as towards any person who had treated me as friendly as he had. I now believe that Keithler had told Sims about my riding his horses at night, and that he was the cause of Sims turning me off. On leaving Sims I went to the mill, got Keithler's horse and started to Raymond; on my way to that place I met Keithler coming from Mr. Regland's, young Mr. Deuson was with him; as I approached, Keithler hallowed to me, saying, 'something was out;' the young man, Deuson went ahead, and I took Keithler one side, and there we held a conversation in which Keithler said to me what Sims said, and [said] 'from his manner last evening there will be a difficulty, and you had better arm yourself.' I then went on to Raymond to see Mr. Hunter, who was to engage me to work at the carpenter's trade; I saw Mr. Hunter and returned to the mill. Mr. Keithler had been to Mr. Sims's and returned with my clothes that evening; Keithler told me Sims had sent for him, but he did not want to see the damned old son of a bitch; Keithler and I went to Cooper's mill together; whilst there Sims's boy came with a horse for Keithler; he at first refused to go, but, by my advice, he went. Keithler, on various occasions, urged me to kill Sims, saying, Sims had threatened my life; he told me to take his horse and station myself on the mill road, and kill Sims; Keithler would not let me have the horse except for the purpose of killing Sims. I rode his horse almost every day for the purpose of killing Sims, and when I returned, he always asked if I had killed him? On one occa-

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sion I stationed myself on the road to kill Sims, saw him, but not finding it in my heart to kill him, I rode one side, I returned. Keithler asked me if I had killed Sims? I told him 'I had not; it would be all right to-morrow.' He then said, 'God damn you, I do not believe you have the heart to kill a man.' I then said, it was a hard-hearted thing to take another's life. He then stated it was a common thing to take a man's life in New Orleans and New York, where he came from. 'It was on Monday or Tuesday, I do not remember which, that he commenced urging me to kill Sims; after that it was the constant subject of conversation day and night. I slept with him at the mill until Sims was killed; I would put him off by telling him it would be all right to-morrow. On Wednesday morning, the day on which Sims was killed, when I left, Keithler advised me to go and kill Sims. I went to Mrs. Dawson to see her, to ascertain whether or not Keithler's messages to me from Sims were true or not; she said she would have nothing to do with it, and referred me to a Mr. Winter, in Madison county, her brother. In the evening I returned, found Mr. Jones at the mill; after some conversation with Mr. Jones, in Keithler's room, I went into the mill; after a little time, Jones came into the mill; after a little conversation, myself and Keithler went to the well about thirty paces distant; Keithler there told me he had been at Sims's that day, and that Sims told him that he intended to kill me at sight without giving me time to wink; he insisted that I should kill Sims that evening, as Parsons would be passing from Newtown on that evening or the next day by the mill, and he wished Sims out of the way, so that he could know what to do as to Parsons's proposition to go into partnership with Parsons in building a mill, as he believed Sims's mill would be a better arrangement for him than the proposition made by Parsons; within an hour from that conversation I killed Sims; this was on the Wednesday week (eleven days) after I left Sims; after killing Sims in his cotton field, I went down to the mill and Lusk's house, which was within thirty yards of the mill; I went first to a blacksmith's shop, which was near the mill, and directed a negro to draw me a bucket of

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water from the well which was about thirty paces from the mill; I then went to Lusk's house (where I and Keithler boarded) washed my hands in the bason, took Keithler's bridle which was there, and which I had been using the day before, and started back, passing by the blacksmith's shop to the mill to return the bridle to Keithler; I met Keithler behind the blacksmith's shop; he came running up to me, and asked me, Have you killed Sims? I answered, Yes! Did you kill him so dead that he could not speak? I answered, Yes! He then told me to give myself up; that what Sims had told him that day would clear me; that he would employ counsel for me and see me out; and that he would come to Raymond the next day and see me; all this occurred before Bankstone came up. The next time I saw Keithler was in jail; I saw he was an altered man; I told him he had brought me to this. He observed, he knew it, and that he would spend his last dollar for me, that he would go his death for me. I have not stated the one half that Keithler did. The killing of Sims was the subject upon which we always conversed; we walked to Cooper's mill and the Mississippi springs, and the killing of Sims was the subject-matter of our conversations during many nights. He told me that Sims charged me with being intimate with his slave Catherine; that Sims charged me with stealing lumber, &c., and promised that if I would kill Sims, the management of the mill would fall to him, and that he would run two saws, and that he would give better wages than I could get from Sims; he kept me from joining the volunteers, and urged me not to go, but to remain with him and kill Sims; I never would have killed Sims had it not been for Keithler; the thought of killing Sims never suggested itself to me until Keithler suggested it; I acted entirely through his counsel.

"Question by the state. Have you any hope of pardon in this case? Answer I have no hope in this world of pardon. What induced you to kill Sims? Ans. Keithler first put it into my mind, and before he did so I felt as friendly to Sims as I would do to any one of you who would treat me as Sims did; on Sunday morning I did not know why he turned me off, and

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after Keithler had told me all that Sims had charged me with, I at one time saw him at the woodland gate, and wished to ask him if what Keithler told me was true, but he would not listen to me, and said he would not let me talk to him.

"Cross examined.

"Question 1. Did you not state on a former examination, when Keithler was on his trial before the committing court, that everything contained in the voluntary confession made by you, when on trial yourself, was true? which voluntary confession, at the instance of the accused, and by the consent of the district attorney, was admitted in evidence, and is as follows in words and figures:

"State of Mississippi, Hinds county:

State v. *John Silas.*

This day John Silas was brought before W. G. Jennings and G. W. Harper, Justices of the Peace, charged with the murder of B. G. Sims, on the 24th inst. all of the county and state aforsaid, this the 27th day of June, 1846.

"The prisoner being asked to make a statement, proceeded as follows: 'On Saturday night, before I quit Mr. Sims's, a horse that I had been in the habit of riding, was discovered by me to be locked up; I had heard that Sims had been told that I had been in the habit of riding him at night; Sims said that he had not been told so by a white man, but that he was ready to settle with me; I told him I would not come to a settlement, unless he would settle for the whole year; he told me to leave his premises that day; I then came to town to see Mr. Hunter; while in town, Sims had my clothes thrown out, and sent to the mill; I returned on Sunday, and desired that Sims and I should come to an understanding as to the cause of quitting; he told Keithler, that he had turned me off because I was intimate with one of his negro girls. I went to Mr. Fitzpatrick, to get him to speak to Mr. Alston that week, and leave the matter at difference, with them. Mr. Keithler had told me, a week before I went down to Mrs. Dawson's, that Sims had threatened my life.' On the day the circumstances occurred, I went down to see Mrs. Dawson; I requested her to come and enable Sims and I to come to an understanding; and she referred me to Mr.

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Winter, one of her brothers. After getting home that evening, Mr. Keithler told me that he had just returned from Sims's that day, and that Sims had threatened to shoot me down at sight, without giving me time to wink; that my life was in danger; that Sims would shoot me down whenever he met me. Mr. Keithler advised me to kill the damned son of a bitch; and that he would have killed him before now. After this had been told me, I went up through the corn-field to Mr. Sims's, and stepped upon the fence, and told Sims that I wished some understanding about this matter; that I wished it laid open before the people. He observed that I should not talk to him; and drew a pocket-knife, and cut me across the finger, when I shot him. (The cut was shown; it being on the fore-finger of the left hand, near the knuckle.) I was attempting to take hold of him when he cut me. As I shot him, his horse dodged off with him, and threw him; he made at me with his hands extended, when I made at him with my knife, with which I cut him in several places, how many, I do not know. After the affair, I went to the mill, and gave myself up to Mr. Bankstone. I shot Sims but once; the second pistol I shot in the corner of the fence, because I did not wish to carry it loaded.

(Silas in his confession details an alleged effort on the part of Sims, to have intercourse with his slave Catharine, and proceeds thus:) I told Mr. Jones of this transaction, before Sims and I fell out. Sims fell out with me because he had been told that I had been intimate with his girl Catharine. He said he would tell the planters, so that I could not get business in the country. If I don't get justice here, I will get justice some day. The charge, that I had intercourse with Sims's servant or servants, is utterly untrue, without foundation. The transaction between Sims and Catharine, and her mother, occurred when I was ploughing over corn, the first time. Further, the prisoner saith not.

"JACK FOUNTAIN his × mark. SILAS.

"*Test:* W. G. JENNINGS, J. P.
GEO. W. HARPER.

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"The voluntary confession was read to Silas, and he answered, that, as to the first part, where the confession states, that Sims, on the morning of the separation, stated to him, that no white man had told him so, he was not certain; that he believed that Keithler had so told Sims."

In answer to further cross-interrogatories, Silas answered, that Keithler had first mentioned the subject of killing Sims, on the Monday or Tuesday after he left Sims. In answer to the question, whether he had not, on a former examination, stated, that Keithler first mentioned the subject on the evening of the Sunday after Silas's return from Raymond, and after Keithler's return from Sims's, in Keithler's room at the mill, the witness said he had been so long confined in jail, he could not say; he did not recollect.

That on the day he left Sims, he called on A. Jack. Johnston, and asked him for pistols; Keithler had told him to arm himself; that he might have told Johnston the difficulty between Sims and himself, arose about the slave Catharine, but he did not recollect it; that he did not tell Johnston, that Sims was attached to Catharine and believed she had been intimate with the witness, and was mad because Catharine preferred the witness to him; that he did not remember having told Johnston that Sims, the night before he left, had severely whipped Catharine, up stairs; that he did not see Anna Sims at the time he killed Sims; she was not there; that the statement made in his voluntary confession about Sims and the slave Catharine, was true; he shot Sims twice; his memory was confused, and he did not remember having said before that he shot him but once, and fired the second pistol in the corner of the fence; that he did not threaten to shoot Sims's servant Carter, when he came up, nor did he run him off. After killing Sims, he (Silas) started off and run; he met Carter in running, and Carter became alarmed, turned, and ran another way. "After killing Sims," the witness proceeds, "I went to the mill; first to the shop, some little distance from the mill, where Keithler was engaged at work; then went to the well, got a drink of water, then went up the hill to Mr. Lusk's house; went into the house

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and washed my hands in a bowl of water; believe somebody handed me a towel; don't know whether Mrs. Lusk saw me or not; there was nothing to prevent her seeing; did not see Keithler after the deed, before Bankstone came; never, until he met me coming down from Lusk's house; went to Lusk's house to get the bridle; did not get the bridle to escape; think Lusk's house not further from the well than the mill; in coming from the place where Sims was killed, was nearer the mill than the well; does not know whether the water he washed in was bloody or not; had a cut on my finger, which bled; Sims did not cut me on the hand in the fight in which I killed him; my hand was not cut by him; no words passed between Sims and me before I shot him; I shot him twice; did not shoot one pistol in the corner of the fence. I was down in McGowan's neighborhood on Monday or Tuesday night before I shot Sims; I had gone there with Keithler; he and myself kept a couple of negro girls there; I do not know how long I stayed, nor when I got to the mill. The night before I shot Sims, Keithler and I talked all night about it at the mill. I had told A. N. Jones in his cotton-patch, of Sims's attempt on Catharine and her mother. On Monday before I shot Sims, I went to E. H. Stone, to find an overseer's situation. I was at the Mississippi Springs the day I shot him; I got drunk there; it was the first time in my life I had been drunk; I met Mr. Dixon there; I suppose I spoke of killing Sims; I do not know what I said.

"On Sunday before I shot Sims, Keithler and I were sitting on the bed in Keithler's room; Ragland came riding up; Keithler sprung up, saying, 'There comes old Sims, now,' and seized a pistol from his trunk, when he discovered it was not Sims. On Wednesday morning, he walked with me, and at Ragland's gate, loaded a pistol for me to kill Sims with, and used a part of his pocket-handkerchief as wadding in loading it; Keithler would take the pistols every night and put them in his trunk, and would hand them to me in the morning, when I would go out to kill Sims. I have not stated, nor can I remember, the tenth or the hundredth part of what Keithler said about killing Sims; it was a constant topic with us."

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"The printed confession of Silas, published at Port Gibson, was, at the instance of defendant and his counsel, and by consent of the district attorney, admitted to be read as testimony in the case, as follows:

"CONFESSION OF JACK F. SILAS,

Who was tried and convicted at the April term, A. D. 1847, of the circuit court of Claiborne county, Mississippi, and sentenced to be hung on the fourth of June, following, for the murder of Mr. Benjamin G. Sims, of Hinds county, Mississippi.

"PREFACE.

"By way of preface, I would say, that the design of the confession of the prisoner (J. F. Silas) is not to prove his innocence, or the unjustness of those by whom he has been tried and convicted. On the contrary, it is to acknowledge his guilt; to applaud the impartiality of his judges, and to convince the people, if not already apprized, of the cowardly baseness of him who urged him to strike the 'blow of death.' The latter part of his declaration, comprises his testimony against the instigator; he prays the people to examine it. Before a just Heaven, with the dark shadow of the sentence of death, held out by the stern arm of the law, preventing the least ray of hope for pardon or escape, he pledges the truth of his assertions, and wishes to live only to behold Keithler receive his more than just punishment. He tenders his last and best thanks to the young men of Port Gibson and vicinity, for their kindness manifested towards him during his confinement; and he prays the citizens of America, not to cast any blame upon his kindred; that when he receives his punishment, his crime and the disgrace attending it, may be buried in the grave of forgetfulness with him, never to be remembered but by those who may pause to commit a similar crime; to such he would say, beware! Remember him!

"THE WRITER."

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"CONFESSION.

"I was born in Warren county, Georgia, on the 25th of October, 1823; my father in North Carolina, my mother in Virginia; she was a member of the Baptist Church upwards of forty-three years; they were once in very good circumstances, until the death of my mother, in 1839; upon her bed of death, she warned me to shun the evils of the world, and to meet her in heaven.

"At this time, when a lad of sixteen, I came to Marion county, Georgia, and took charge of a plantation and negroes, for Messrs. Kinchexire and McKinney; up to this time, my character was without a stain of crime; my mother's admonitions shielded me from the allurements of the world. I have never had the benefits of an education; I cannot read or write. I remained at K. & McK.'s, twelve months, when, not satisfied with my salary, I left, and took charge of another, for Mr. Hytower, in Upson county, Georgia; remained there two years then left for Barbour county, Alabama, and superintended a plantation for Harris Freeman; being seized with sickness, I was persuaded to abandon the business, and travel, for the recovery of my health. During my sickness, which lasted fourteen months, I visited my friends and acquaintances in the adjacent counties and states." (The confession of Silas here proceeds to detail the progress of his sickness, both of body and mind; his frequent relapses; being more than once at death's door; his various journeys from place to place, until his arrival at his brother's, in Chickasaw county, in this state; his illness, and derangement of mind, there and elsewhere; his recovery, and falling in love with a young lady; their engagement to be married; the falsehood by which he sent his brother back to Georgia for money that had no existence; his seduction of the young lady, during his brother's absence; her father's attempt on his life; his intrepidity and escape; his remorse, and junction with the Methodist church; his failure to obtain relief of mind, and consequent ineffectual attempt at suicide; departure

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from his brother's, and adventures until he arrives at Vicksburg, Miss., when his confession proceeds thus:) "After remaining in Vicksburg some time I became acquainted with Henry Keithler; my feelings towards him at first sight I cannot express, but I became very much attached to him; he seemed to interest himself in my welfare, and recommended me to Benjamin Sims, near the Mississippi Springs, Hinds County, Miss. Having consumed all my money by dissipation, I availed myself of the prospect and immediately started, arrived at Clinton, hired horses and servant, arrived at Sims's, and succeeded in getting into business with him. After remaining there for some time, I became very much concerned about my situation and treatment towards my friends and relatives, and frequently conversed with Mr. Sims upon the subject. Taking a retrospective view of my past life, I became very much embarrassed, my mind became more uneasy. I thought of my father, of my treatment towards the young lady, and the advice my mother gave me; spent my Christmas before his house indulging in gloomy thoughts. My wages were very poor, but I was compelled to submit. I engaged with Mr. Sims on the 24th of December, 1845, and left 14th of June, 1846. Keithler was also employed by Mr. Sims to attend to his mill. Before leaving Sims, Keithler and I were very intimate, were together frequently during the week and Sundays, and at night we would walk to the Mississippi Springs, and in the neighborhood. During my stay at the house I was treated as one of the family; my every want was satisfied, and no harsh feelings existed until the morning of my departure; on the Saturday night previous to my departure, the saddle-horse I had been in the habit of riding, was taken from the lower lot and locked up in the upper. At the breakfast table on Sunday morning, I did not know but that the same good feelings formerly manifested still existed. I went out to the horse lot for the purpose of getting my horse to go to church; I asked a negro boy where he was; he told me the circumstances; I asked him if he knew the cause; he replied, that Mr. Sims said that some white man had told him that I had been in the habit of riding his horse at night. This

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somewhat astonished and vexed me. I immediately went to the house and asked an explanation; he replied, 'no person but you will leave to-day.' I observed that I thought it very strange he should discharge me after wishing to employ me another year; he gave me no satisfaction, and never did inform me.

"I left his place on that day, went to Mr. Hunter's at Raymond; on the road I met Keithler; before meeting, he cried out 'that there was something out.' I asked him if he could explain the difficulty between Sims and myself. His reply was, 'he calculated from the manner Mr. Sims left the mill yesterday, that I would kill him on the field or he would me;' and observed, 'I told them so at the mill'; but did not say to whom he spoke. I again asked for an explanation of the difficulty. He observed that Mr. Sims accused me of going to run away with one of his negroes, and went on to state many other things that Sims accused me of, said that he just raised the report to run me off because the crop was finished, as he usually did his overseers. I observed that I would see some of the neighbors about the matter. I then parted with Keithler and went to Raymond; made arrangements with Hunter to remain with him three years, for the purpose of learning the carpenter's trade; I again returned to Mr. Sims, and asked an explanation. He refused to speak with me. I then asked him if he would let my clothes remain until the following Tuesday. His reply was, 'I certainly will do so.' I then went to the mill; Mr. Keithler was sitting in the room when I rode up; he observed that Sims had sent for him, and that he had told the boy to tell Sims that he was not at home; that he did not wish to hear what the damned old son of a bitch had to say. After dinner we rode out as far as Mrs. Cooper's sulphur well, where we were overtaken by Mr. Sims's boy, who said Mr. Sims wished Keithler to come immediately to his house. He refused to accompany the boy, making the same remark to me that he made when he told me he told the boy he was not at home; through my persuasion he went. On his return from Sims, he brought me a very insulting and aggravating message; that Sims had

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accused me of everything he could think of; said that I had laid myself liable to a prosecution; accused me of stealing lumber; that I should not have business in the country, and he be damned if I did not leave the neighborhood, if he did not kill me. I replied, that I did not think Sims a dangerous man, that I was going to Mr. Hunter's at Raymond. Keithler said to me, 'Do you hold on here, by G–d, I'll see you righted.' I observed, I disliked to board at Major Lusk's, because we had not spoken since he raised a difficulty between us. He said, 'that was all settled, and he would pay my board if I would stay.' The difficulty between Major Lusk and myself I never could fathom, nor do I think the major understands it. Through his entreaties and assistance, I determined to board at Major Lusk's. On the following Monday and Tuesday, I rode off one day to Raymond, the other to McGowan's; on my return on one of the days, Keithler came running from the mill, told me that he had seen Sims, that he said 'he be d——d if he did not mean to kill me,' that he knew Sims was going to take advantage of me from what he told him. I replied that I did not care anything about Sims; I was going to Raymond that evening and remain. He insisted very strongly that I should not go that evening, but that I had better go up on the mill road and kill Sims before he took the advantage of me. I concluded I would go see him, and again ask an explanation. I went, but seeing Mr. Sims, I left the road and went back to the mill; thought it best to say nothing to him. When I returned at night, Keithler insisted stronger than before that I should kill him, saying that I did not know what he did. The next morning he renewed his entreaties, said that I had better load my pistols and finish it. We went to load them between Mr. Bankstone's and the mill. On our return to the mill, Keithler observed, that if he had Sims out of the way, he would give me better wages to attend the hands than he did, and went on to state the advantages he would derive to get the mill under his own superintendence and control; and probably he would get Mrs. Sims to put two saws to the mill. This part of the subject I did not rightly understand; I did not wish to murder

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Sims for expected wages, and concluded I would search for Sims and again ask him to explain himself. I went upon the mill road, saw Sims, and went and met him at his woodland gate. I asked him if he would have a friendly conversation with me. He refused. I would have explained the whole of Keithler's plottings had he heeded my entreaties, but Sims turned a deaf ear to me. I no longer thought of Keithler's base intentions; my mind was ungovernable. I returned to the mill and did not know how to act. Keithler came to know if I had committed the crime. I replied no; that I thought it a serious matter to take a man's life upon any occasion. He observed, that if Sims had threatened his life as he had mine, and used his name and character in the same way, he would think no more of killing him than he would a hog; and made light of me for not doing so, and observed that I was not the man he took me to be. I told him if he wished Sims murdered, he would have to do it himself. He then tried to reason the case; referred again to Sims's threat, and insisted I should kill him the next morning. I told him that I was going to Hunter's, in Raymond, but he insisted upon my not doing so; said that he wanted us to stay together; that he had become so much attached to me that he could not part with me. I replied that if he wished us to remain together and would go to Mr. Parsons, I would have no objections to do so. He intimated he would. I saw Mr. P. on Saturday, and made arrangements with him; on my return, I told Keithler I had seen P., and everything was favorable. On the same morning, Keithler said, 'By G–d, if he had old Sims out of the way, that this mill would be the best chance.' (It seems that he and Parsons thought of erecting a mill in partnership.) I then perceived his intentions, and told him I was going at once to Raymond; he then prevailed on me in stronger terms than ever not to go. During our conversation (on the bed) Mr. Ragland rode up to the gate of Major Lusk's; Keithler jumped up from his bed to his trunk, snatched his pistol, and as though much interested in my safety, observed that 'Sims had come to kill me.' I ran to the door and looked out, saw it was not he, told Keithler it

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was Ragland; immediately I left the room, and went to where Ragland was; in my conversation, he told me that he thought Mr. Stone would give me a situation. I said nothing to him about this affair. On Monday, I started to the Mississippi Springs; Keithler had gone the same road to see a boy he had sent to Clinton for hides; on his return I met him; he renewed his entreaties and insisted on my taking his horse, going up the road and at once be done with Sims; that he knew he would come down to see about the hides, and that I did not know the danger I was in; that Sims was determined to kill me. I replied, that I could not conceive why Sims wished to kill me; he said I did not know what he knew; I said no more, but went on to the Mississippi Springs; remained there but a short time; during my stay, Mr. Hamilton told me that his brother-in-law wished to employ an overseer. I returned to the mill, took Keithler's horse and went to see Sims and Stone the same day; applied to Stone for a situation, but a young man had been previously engaged by him; I told him that I would take charge of any business for nothing, that I had been badly used by Sims; I was under the impression from the messages I received through Keithler, that Sims intended to kill me or drive me out of the country, and I felt that I had rather take business two years for nothing than be run out of the country; my motive was to show the people that Sims had treated me unjustly; not knowing that I had been humbugged until after I had killed Sims, I thought Keithler was my friend, and relied as much upon what he told me as I would have had I heard it from Sims's own lips. I having failed in my business, returned to the mill; Keithler asked me if I had committed the crime. I told him I had been on the road, but had not seen Sims; my object was to keep Keithler's horse, which he would not loan me under any other circumstances. At night he spoke to me again; recapitulated the threats and accusations of Sims, and prevailed on me to accomplish the deed, to kill Sims and be done with it, alleging that he would take some undue advantage of me. In the morning, he insisted again; I took his horse and went to the Mississippi Springs; being nearly overcome by

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what Keithler had so frequently told me, and wishing to drown my sorrows, I commenced drinking, got drunk, used some observation to Mr. Dixon about the affair, was taken to bed; remained in bed till supper; summoning up my weak and scattered ideas, I resolved to go to Vicksburg, join a volunteer company and leave the country. I asked Major Lusk at the supper table if he would take me to Clinton the next day. He replied in the affirmative. Keithler asked me to go to our room. He there entreated me by his lasting affection not to go off, to abandon the idea; said my health was entirely too bad, did not think that I could stand the toil of the camp, or the hardships of a soldier; he expressed every measure of good feeling and friendship, used every exertion to persuade me against my resolution; no sleeping was done; this occupied our minds the whole night. When morning dawned, he told me to take his horse, go out before he did, he would go to Sims and draw off some writing (not known), after which I was to kill him wherever I found him. After Keithler left the mill, I concluded I would go to Sims's sister-in-law, and prevail on her to see Sims and ask an explanation. I went; asked her to go; she said she could not, that her children had the measles. I asked her when she could. She said not under a week. I gave her to understand there was something out. She referred me to her brother-in-law in Madison county. If she had gone, I would have led her into the light of the whole transaction.

"I returned to the mill, found Mr. Jones there, went into Keithler's room, where Jones was, we held a conversation together, he wished me to accompany him home; I told him my horse was tired, but the next day I would come over. He said he wished to see Keithler about some lumber. I told him when he got through I wished to speak to him; he assented; I designed telling him, but he did not return. I went to the mill where he was; when I reached the door Keithler asked me to walk to the well and get some water. I did so; on the way there he asked if "I had done it?" I told him no. He then replied, "the thing was out, that Sims had told him he would kill me on sight, without giving me time to wink;" and

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asked if Major Lusk had not told me? I told him no; that he had gone to Raymond; he replied he thought Lusk would have told before; said he knew how it would be; that I was a d——d fool for not killing him long ago; that I had better go and do it now wherever I could find him; that if an officer should come to take me to give myself up; take his horse; he would furnish me a lawyer, and I would not have to go to jail. I was entirely overcome; I thought (as well as a deranged man could think) over the subject; for my own safety I concluded to kill him. I went upon the road, then went into his corn-field, saw him, went up to where he was, shot him off his horse, then stabbed him, turned and went away. I saw no one near Sims; his daughter was not there. After I left him I saw only a negro boy. I then returned to the mill. After I had been there a few minutes a neighbor, Mr. Braxwell, came for me; said he came to take me to town; I told him I was willing to go. He asked me why I shot Sims? My reply I do not remember. I met Keithler behind the room, he told me to take his horse and go, that I would not be confined, and that he would get me a counsellor. I went to town with Braxwell, and gave myself up to Mr. Jennings; I was immediately taken to jail. After I remained there a day or so, Keithler came to the cell; his appearance was unnatural. Only then did it occur to me that he had deceived me. He said I ought never to have let Sims have spoken. I blamed him for my being confined; he said, never mind, he would clear me. That as things had turned out so bad he had better not give in his testimony until the circuit court; that he wished to wind up his business at Sims's before he did. I thought from this that he was going to run away. After this I had no communication with him; the truth flashed upon my mind, and I saw, for the first time, that I had been wrongfully informed; that I had been badly duped, and urged to do that which never would have been done by my own consent. From this time henceforth I renounce every feeling of humanity for him." The residue of the confession consists of the address of Silas to the reader, and to others; which is not considered material.

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The statement of Silas, before the magistrate who committed Keithler on the latter's examination, was also read. It is not deemed requisite to set it out at length. In it he states that every word in his voluntary statement is true; to the best of his recollection Keithler first told him to kill Sims on Sunday evening. At the second conversation Keithler told him to kill Sims, and he would give him an interest in the mill. Keithler told him that Sims owed him considerable, and if Sims was killed the debt would be better, as Mrs. Sims would be more likely to pay it. Keithler told him the mill would fall into his hands. By Keithler's directions he placed himself in particular positions twice; on two other occasions he placed himself on the mill-road, without the locations being specified by Keithler. The cut on his forefinger was done by Sims. Keithler was the whole cause of his killing Sims. He never stated to any human being until that day, that Keithler had prompted him to kill Sims. Keithler, in prompting him to kill Sims, used the argument that the management of the mill would fall to him, and that he could pay him better wages than Sims had been paying.

In other particulars this deposition corresponded in the main with Silas's other statements.

Anna Sims, of the age of twelve years, deposed, in behalf of the state, that she went down to see her father, to inform him of the death of Mary Thomas. When she got down there she saw Silas level a pistol on the fence, and shoot her father; her father being in the cotton-field, and Silas in the corn-field. After he shot him Silas jumped over the fence and threw clods at him. After her father was shot he stumbled over six or seven cotton-rows, when he fell; Silas then beat him over the head with a pistol; stabbed him with a knife which she supposed her father had presented him. Silas shot him twice; on the second shot Silas put the pistol to his face. Sims begged Silas during this time to spare his life. As soon as he fired the second time he ran and jumped over the fence; before he shot the second time Silas stamped him in the region of the eye, and appeared to be loading a pistol; Carter, a servant, begged

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Silas to save his master. Silas told him to leave or he would shoot him, and started towards Carter, when Carter ran away. She was inside of the cotton-patch, on the same line of fencing that Silas got over; probably forty or fifty yards from where the scene occurred. The ground where she was, was higher than where Silas was. She was looking at her father as he approached; he was coming from the cotton-house; she hollowed while it was going on as loud as she could. On cross-examination she stated that no words passed between Silas and her father, no signs would indicate it. She knew nothing of any difficulty between Silas and her father. She heard her father say that if he caught Silas about his negro-cabins at night he should shoot him. Silas saw her, looked at her very hard after firing the second pistol. He had two pistols; drew the second pistol after he had stabbed with the knife. She went to the house after the affray; her father's knife was at the house.

P. M. Alston, for the state, testified as follows: "I was sitting in my porch, and heard a pistol in Sims's field; seeing my negroes run in that direction I started over; when I got four or five hundred yards heard another pistol; when I arrived there the negroes were carrying Sims home; had carried him twenty-five or thirty yards. Sims had received two bullet-shots in the abdomen, together with one in the face, and eighteen or nineteen wounds with a knife. Sims said there was no chance, he was certain of dying; he was in his right mind; he said he was riding in his cotton-field, near his corn-field fence, when he received the shot in his abdomen; fell from his horse, staggered seven or eight paces, and fell. Silas leaped over the fence, and stabbed and cut him with a knife; did not know whether he was stabbed before he received the second shot, or not. He said that he had said if he caught Silas prowling around his negro-quarters at night he would kill him. Sims was wounded on Wednesday, and died on Friday.

"On the evening of the killing, while I was at Sims's house, and Mr. Keithler walking about in the gallery, was requested, about candle-light, to come into Mr. Sims's room; Mr. Sims,

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myself and two ladies being there; when he came in Mrs. Sims asked him if he had seen Silas, he said he had seen him half an hour since, riding in the direction of Raymond, with a man he supposed to be Mr. Gaines Bankstone; Mrs. Sims asked him, why he did not arrest Silas? He said he knew nothing of the matter until he came up to the house. On Friday morning Keithler was requested by me to come into the presence of Sims, I saying it was understood he knew of threats made by Sims against Silas, and I wished him to state, in the presence of Mr. Sims, what those threats were, as Mr. Sims was then in his senses, though in a dying condition, and wished to hear what threats he (Sims) had used; Keithler stated then, in the presence of Mrs. Sims, myself, Mr. Mount, and others, that the only threat he had ever heard Sims use, was, that if he caught Silas prowling about his negro quarters he might abide the consequences. I helped to carry Sims to his house, and undress him; he had no weapons about him."

H. G. Bankstone, for the state, testified that he apprehended Silas. "When I arrived at the mill I went in where Keithler was, and told him Silas had shot Sims, and I wished him to assist me in taking Silas a prisoner; he said he would rather not, and wished me to get some one else, observing that Sims had threatened Silas's life the day before; I told him it was his duty, as a citizen, to assist in an affair of this sort; he then said he would go down and see Silas, and tell him to give himself up to me; he started down stairs, I after him; when he got to the ground floor he struck a trot up to Lusk's house where Silas was; I kept after him, but did not run after he passed round the blacksmith shop, which hid Lusk's house from me. Keithler met Silas behind the shop, out of my view; I could not hear anything that passed between them; they came and met me between the shop and the mill; Silas observed, you have come after me; I replied affirmatively; he said he was willing to go with me; we started for Raymond."

W. H. Mount, for the state, testified that he was with Sims after he was shot. Keithler came to Sims's Thursday evening; at the supper table Keithler, in reply to an observation made by

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witness, said he thought the affair was not a horrid one; after Keithler made this remark he went into the porch; being surprised at it the witness followed and asked him, if he knew of any threats made by Sims against Silas, to state them to him. He told me that Sims had said that if he ever caught Silas on his plantation, he would shoot him. Witness asked him if Sims had not said if he ever caught Silas prowling about his negro quarters, he would shoot him; he said not. He replied in this manner twice. At this moment Keithler was called into the presence of Sims. Alston asked him, when he got to the bedside of Sims, what threats he had heard Sims make; he said that all he had heard Sims say, was, that if he caught Silas about his negro quarters, he would do something with him, thus contradicting positively what he had a few moments previously stated to the witness.

A. N. Jones, on behalf of the state, testified, that on the evening Sims was shot, he went to Sims's mill to see Keithler about some lumber; shortly after, Silas rode up, and witness conversed with him; Silas said, he anticipated a difficulty with Sims; the witness went up stairs to see Keithler, Silas soon after followed, and the three remained a short time together; Silas then went down to the well and beckoned to Keithler, who went down also; they remained at the well a short time conversing; the witness could not hear what about; they drank water and returned, when Silas rode off; the witness afterwards saw Sims on the same day, who said, if he saw Silas prowling about his negro quarters, he would shoot him; that Silas had seduced his negro girl Catharine, and he would not permit him to come about his place.

William A. Dewson, for the state, testified, that on the Sunday that Silas left Sims, the witness and Keithler were returning from Raymond to the mill, when they met Silas; Keithler cried out to him, "something's out;" they stopped and talked together, and the witness passed on and did not hear what they said; the witness lived at the mill, and slept in the same room with Silas and Keithler; the two latter slept in the same bed after Silas left Sims, till he killed him; Silas and Keithler were

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almost always together while Silas was at the mill, and took frequent walks to Cooper's, the Mississippi Springs, &c.; on the Tuesday night before Sims's death, the witness was at the mill, Silas and Keithler were lying down under the shed, and had a long conversation; he heard Silas say, "it will be all right to-morrow;" Keithler laughed, and said, "you have promised that frequently, and it is not done yet;" he did not hear the rest. On the day Sims was killed, he heard the firing, and saw Silas come from the direction of the firing; he went into the blacksmith's shop, and thence to the house of Lusk, and in a short time returned towards the mill, when Keithler came running round the blacksmith's shop, and passing the witness, met Silas some ten paces nearer to Lusk's house than where the witness stood; when they met, they turned round and walked towards the mill, passing by the witness; as they passed by him, he heard Keithler say, "you had better give yourself up;" they passed on towards the mill, and while behind the blacksmith's shop, Mr. Bankstone came up, and he and Silas went off together.

On one occasion, as he awakened from sleep, the witness heard Silas say, as he and Keithler were conversing in bed, "somebody had promised him a horse and saddle to whip or kill Sims;" the expression "something 's out" was a common one at the mill; and was used by Keithler in a jovial way when he met Silas; when Keithler and Silas met after the murder, they held no secret conversation; and he only heard Keithler say he had better give himself up.

Amos R. Johnston, on the part of the state, testified, that when Silas was in jail on the day after the shooting, he sent for witness to defend him; witness asked him about his case; he referred him to a man named Keithler, whom he described, witness then did not know him, and told witness that Keithler would prove that Sims had frequently threatened his life, and had said on the morning he was wounded, that he would kill Silas at sight, without giving him time to wink, and that Keithler had, at the well, near the mill, communicated this threat to him; the witness told Silas if Keithler would prove these facts,

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he could bail and perhaps acquit him. The witness afterwards found Keithler, and communicated to him what Silas had stated to him, and Keithler said that such was the fact, but exhibited great reluctance to testify; said that he could testify to those facts, but he wished to wind up his affairs at the mill, and would prefer not to be examined before the committing court; it might give offence to Mrs. Sims; but that he would testify before the circuit court, and that his testimony would acquit Silas; the witness told him that his testimony was of vital importance to Silas, and that he must have it; he persisted in his refusal. The witness continues: "I told him I must have his testimony, and would be compelled to have him subpœnaed; this was on Thursday morning, on Saturday morning the trial came on; I had had a subpœna issued for him; he did not appear; I took an attachment for him, and at the same time a warrant issued for his arrest as an accessory to the murder; during the day he was brought in. I walked out from the court-house, and saw Keithler standing under a tree in the yard; he beckoned to me; I went to him, and he said, 'They had me up before Sims the other day and examined me, but that was not a court, and I was not bound to state the truth then.' The trial of Silas came on, and Keithler was introduced as a witness for Silas; on examination, he refused to testify to the facts which he had stated to me; and Silas, springing up from his seat, propounded this question to him; 'Henry, did you not tell me at the well, on Wednesday evening, that Sims said that day that "he would kill me on sight, without giving me time to wink?"' After some hesitation, he replied, 'Why, Silas, you know that is not so.' Silas repeated the question in considerable excitement, and Keithler denied that he had communicated any such threat to Silas at the well, but said that Sims had made use of the expression that day to him: 'I will kill Silas at sight, without giving him time to wink.'"

T. J. Hunter stated, that Silas had, on the Wednesday before, and the day that he left Sims, been to Raymond to see him, and he had agreed to employ Silas as an apprentice to the trade of a carpenter for three years.

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Dr. J. L. Wydown testified, that the two shot wounds in the abdomen were the cause of Sims's death; he was, besides, stabbed twenty-one times, and one of his eyes stamped nearly out; yet of these wounds he might have recovered. The state here closed.

G. W. Harper, one of the justices before whom Keithler was committed, testified for the prisoner, that Silas, on the trial of Keithler, swore that his whole voluntary statement was true; and that the statement on Keithler's trial before him, was taken down by witness correctly, and was what he swore on that occasion.

A. Jackson Johnson testified, that on the Sunday Sims turned Silas off, Silas came to him to borrow pistols, and stated that Sims had turned him off about Catharine, being mad with him, because she preferred him to Sims, who was much attached to her, and had severely whipped her the night before; that he wanted the pistols, because he expected a difficulty with Sims, and all he was afraid of was that he would not get a fair fight.

E. H. Stone, for the state, testified, that on the day of, or day before the murder, Silas had told him that he wished to remain in the neighborhood the balance of the year, even if he worked for nothing; he wanted revenge of Sims, who had treated him badly.

This being all the evidence, the state asked for this instruction; "It makes no difference to the merits of this case, whether Silas conceived the design to kill Sims before his interview with Keithler or not; if Keithler encouraged him in that design by falsely stating to him threats of Sims, or persuading him to kill Sims, Keithler is guilty."

The prisoner asked for these instructions;

1. The burden of proof rests upon the state, and it devolves upon it to establish the guilt of the prisoner beyond all reasonable doubt; for the jury to doubt is to acquit.

2. The proof on the part of the state must be so strong, as to exclude every hypothesis inconsistent with the guilt of the prisoner.

3. The law presumes every man innocent until the contrary

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is made to appear, either by direct and positive proof, or by circumstantial evidence as satisfactory in its nature.

4. The evidence of a principal against an accessory, although admissible before the jury, is to be regarded with great suspicion; as it is a confession of the weakness of the law, that it calls in the assistance of those by whom it has been broken, and destroys the last virtue which clings to the degraded transgressor.

5. It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved, to wit, the guilt of the prisoner.

6. Unless the evidence exclude all reasonable doubt of the guilt of the accused, and unless the jury are so well convinced by the evidence, that they would venture to act upon that conviction in matters of the highest concern and importance to their own interests.

7. It is essential, that the circumstances should be of a conclusive nature and tendency, and that all the facts should be consistent with the hypothesis of guilt.

8. The absence of any apparent motive, must operate strongly in favor of the accused, especially when there is no reason to apprehend any unsoundness of intellect.

9. A witness who gives false testimony as to any one particular, cannot be credited as to any; for the presumption, that the witness will declare the truth ceases, as soon as it manifestly appears that he is capable of perjury; the credit of witnesses is exclusively a matter of consideration for the jury.

(Opposite this instruction in the record, is written the word "*modified.*")

10. Faith in a witness's testimony cannot be partial; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result, his testimony is to be credited or neglected.

(Opposite this instruction in the record, is written the word "*refused.*")

11. The testimony of an accomplice, can only be received when his character is established as a witness of truth, in mat-

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ters where he is not corroborated. If on the other hand, notwithstanding the corroboration upon particular points, lurking doubts and suspicions still remain as to his credit, his testimony becomes useless; the credit of an accomplice or principal offender, is to be determined by the jury; they are to judge of his credit from the circumstances and proof offered in corroboration, whether they are to believe him or not.

(Opposite this instruction in the record, is written the word "*modified.*")

12. It is incumbent on the state in this case, to prove the general allegation, that Keithler did feloniously and maliciously incite, move, procure, aid, abet, counsel, hire and command Silas to kill and murder Sims.

13. If the jury believe from the evidence, that Keithler communicated to Silas, any threat made by Sims against him, without malicious intent to produce the death of Sims, such fact would not support the charge, that he aided, abetted, procured or hired Silas to kill Sims.

The record proceeds: "All of which the court gave as written, except two, to wit, numbers nine and eleven, which the court refused to give without modifications; which the counsel refused to have given in any modified form, but required them to be either given as written or refused; yet the court did give them with a verbal modification, which the counsel for the prisoner at the time did not object to.

"After which the jury retired; and after they had retired, the prisoner's counsel requested the court to reduce to writing, the verbal modifications he had made to the two instructions he had refused to give without being modified; and the judge accordingly did reduce to writing, the verbal modifications; which being so done, counsel for the prisoner stated to the court, that they understood the verbal modifications, as given to the jury, different from the modifications so reduced to writing by the court, after the jury had retired, and stated, that if the instructions had been given verbally to the jury, as they were when written, they would not have objected to them and requested the court to have the jury called back, and to read to them

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the instructions according to the modifications as written; which the court refused; saying, that they were literally the same with the verbal modifications given. Counsel then requested that the instructions with the written modifications be sent to the jury room, which the court also refused."

After the verdict of *guilty*, the prisoner's counsel moved for a new trial. 1. Because the court erred in admitting the record of Silas's conviction.

2. In permitting Silas to testify.

3. In not giving two of the instructions for the prisoner, *as asked;* and not reading them to the jury after they were modified.

4. In refusing to permit the jury to take instructions which were given on behalf of the prisoner, with them on their retirement, as demanded by his counsel.

5. In giving the instruction asked by the district attorney.

6. Because the jury returned their verdict after twelve o'clock on Saturday night.

7. Because the verdict was not supported by the evidence and the instructions.

The motion was overruled; and the exceptions signed.

Subsequently, on the petition of Keithler, Chief Justice Sharkey ordered a writ of error upon Keithler's giving bond, with sufficient security, in the sum of two hundred and fifty dollars or upon his making affidavit, that he was unable either to give the security or pay the costs. He made the affidavit, and prosecuted this writ of error.

T. J. Wharton, for prisoner, contended,

1. It is competent for this court, in revising the proceedings of the court below, to consider the question of the credibility of Silas. On this point he cited *John* v. *The Insurance Company of North America*, 2 Murphy, 262; *Hutchinson* v. *Coleman*, 5 Halst. 74; Gra. on New Tr. 234; *People* v. *Whipple*, 9 Cow. 707; Greenl. Ev. tit. *Accomplice*.

2. That Silas's various statements and oaths, as detailed in the record, were so contradictory in themselves and so disproved by other unexceptionable witnesses as wholly to discredit him.

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On this point Mr. Wharton reviewed the testimony at length, and pointed out the contradictions and misstatements of Silas.

3. Silas's testimony being discredited, there was not evidence remaining sufficient to convict; Silas alone proved the guilty knowledge and procurement. On this point also, Mr. Wharton reviewed the testimony. He cited 1 Greenl. Ev. 39; Ib. 41; 1 Phil. Ev. 157; 1 Starkie, 6, 399, 406, (Ed. 1826); Ib. 501–505, 510; Ib. 455; Ros. Crim. Ev. 15; 1 Greenl. Ev. 43; 1 Starkie, 29; 492, note.

4. The indictment must be signed by the district attorney; he is elected by the constitution, a *pro tem.* appointment by the judge is unconstitutional and void. How. & Hutch. 27, § 25; *State* v. *Byrd*, 1 How. (Mi.) Rep. 250; How. & Hutch, 279.

5. If the courts have doubts as to the verdict being supported by the evidence, or if the law is not clear, a new trial will be granted. Gra. on New Tr. 369, 370; 5 Yerg. 379; 1 Wash. C. C. Rep. 202; 1 Blackf. 398.

J. J. Davenport, on the same side.

Freeman, attorney-general, for the state.

1. By statute How. & Hutch. 298, 299, the circuit court is authorized, in the absence of the district attorney to appoint an attorney to appear in his stead. No exception was taken below to this appointment. It is said that this law is unconstitutional. It is true that the constitution requires that district attorneys shall be elected by the people, but these terms of office are not prescribed by the constitution, and therefore the legislature has full power to make these terms of office, and to provide for vacancies and the temporary absence of the regular officer.

2. Besides it is not necessary that an indictment or presentment should be signed by the district attorney. Our constitution and statutes adopt the common law. At common law or the law of England, an indictment is complete when signed by the prosecutor, and found a true bill and returned into court by the grand jury. The signature of the district attorney is not required by statute, and is therefore surplusage. See

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How. & Hutch. tit. *Grand Jury*, &c.; Tom. Law Dictionary, *Indictment;* 1 Chit. Crim. Law, 161, 162.

3. The admission of the principal, Silas, to testify against the accessory, is authorized by our statute. How. & Hutch. 725, sec. 18. The conviction affects only his credibility, not his competency.

4. The record of the conviction of the principal, Silas, was properly introduced to show the fact of conviction of the principal, because the record of conviction is the only competent evidence of that fact, except the admission of the fact by prisoner. It is argued by counsel that the conviction was irregular. Silas was the only person who could except to the conviction. He did not do so.

5. Under this bill of exceptions, it appears that two of the instructions were modified, and all the rest were given. The word "refused" is marked on the margin of the bill of exceptions. It is contradicted by the body of the bill which was taken by the prisoner himself, and he cannot deny the contents of his own bill.

6. In the case of *Boles* v. *The State*, 9 S. & M. 284, the court say that the court below may modify instructions so as to embrace the law. The statute of 1846, relied on, refers only to civil cases, and was so construed by this court last winter. See *McQuillen* v. *The State*, 8 S. & M. 587.

7. The motion for a new trial was properly overruled, because several witnesses of undoubted credibility corroborate the testimony of Silas, as the only fact in controversy here, to wit, that Keithler induced Silas to kill Sims. The fact that Silas makes contradictory statements in relation to other facts, can have no bearing on the matter in controversy here.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The several points made in the argument of this case, will be disposed of in the order adopted in the assignment of errors.

First. The indictment is said to be defective, because it is not signed by the district attorney for the district, but by an attorney who acted under the appointment of the court, the

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district attorney being absent. It is contended, that as the district attorney is an officer elected under the constitution for the discharge of certain duties, his place cannot be supplied by temporary appointment in his absence, and that the law authorizing such appointment is unconstitutional. We do not think so. We are not prepared to say that the legislature may not provide that ministerial duties may be performed by a person appointed according to the law in the absence of the incumbent. The duty of the district attorney is to prosecute offenders against the criminal law. He acts as counsel for the state, and in his absence the state has a right to employ other counsel, and the duty so discharged is valid. The constitution declares that a competent number of district attorneys shall be elected, whose term of service shall be prescribed by law. This provision is very general, leaving everything with the legislature, except the election. It is by law then that the district attorney is required to attend the circuit courts and prosecute, and the same law may very well provide for prosecuting when he shall be absent. The legislature has power, by a provision in the constitution, to provide for the filling of all vacancies, not therein provided for. Article 5, sec. 13. If the absence of the district attorney causes even a temporary vacancy, under this provision it may be provided for by the legislature.

On this point, the case of *Byrd* v. *The State*, has been cited, but it does not sustain counsel. It in fact decides the question the other way, by deciding that the district attorney may withdraw, and leave the prosecution to others. On the position taken, it would be impossible to prosecute a district attorney; he would be entirely exempted from offence.

Second. It is said the court erred in admitting Silas, the principal, who had been convicted, and was under sentence, to testify. The statute furnishes the answer to this objection. It provides that no conviction for any offence, excepting perjury and subornation of perjury, shall disqualify, or render such person incompetent to be sworn and to testify in any cause, matter or proceeding, civil or criminal; but such conviction may in all cases be given in evidence to impeach the credibility

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of the person so testifying. H. & H. Dig. 725, sec. 18. The language of this statute is not to be understood literally, as a difficulty might arise from it. It says *conviction* shall not disqualify. Mere conviction never did disqualify; it is the judgment that disqualifies; though it is usually said by law writers, that conviction disqualifies, and hence the language of this statute. See 1 Phillips Evid. 30. The legislature intended no doubt to remove a legal disability, and the statute must be so construed. That he was an accomplice, constitutes no objection to his being a witness. 1 Phillips, 30. As the statute removes the infamy, a principal may now testify against the accessory. *People* v. *Whipple*, 9 Cow. 707; 1 Phil. 40.

Third. The next objection was made to the admissibility of the record of the conviction of Silas. That the record of the conviction of the principal is evidence against the accessory, will surely not be doubted. It was evidence to prove the conviction of Silas, and all the legal consequences, though of course not evidence of the fact of the guilt of the prisoner. But this record is said to be defective in the caption, and in the certificate of the clerk. After a very careful examination, we do not perceive any valid objection to it. It is sufficient in these particulars, both in form and substance. See third Vol. Notes to Phillips Evid. 820, note 582.

Fourth. It is also assigned for error that the court erred in giving the instructions asked by the state, and in modifying those asked for the prisoner. The district attorney asked but one instruction, to wit: that it was immaterial whether Silas conceived the design to kill Sims before his interview with the prisoner or not. If Keithler encouraged him in that design by falsely stating to him threats made by Sims, or by persuading him to kill Sims, Keithler is guilty. This charge was undoubtedly proper.

The counsel for the prisoner asked thirteen instructions, and the court gave all except two, the ninth and eleventh, and they were given with modifications. But how far they were modified does not appear, and we cannot of course undertake to say whether the modifications were correct or not. The charges as

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they were asked, are set out in the bill of exceptions, but the modifications are not. That the court had a right to modify its instructions, has been decided at the present term. For any thing that appears, the modifications may have been favorable to the prisoner, and this is probably the case, as it appears by the bill of exceptions, that the prisoner's counsel did not object because they were given verbally. Some controversy arose after the jury had retired about the instructions, when the prisoner's counsel asked the court to reduce its modifications to writing, which was done, and thereupon the counsel stated that no objection would have been made to the instructions in that form, but the modifications were understood differently. A request was made that the jury might be called to hear the instructions as written down, read to them, which the court refused, saying they were literally the same that had been verbally given. The counsel requested that the written modifications might be sent to the jury room, which was also refused. The argument predicated on this state of things is, that the court had no right to give its instructions verbally. The law of 1813 prohibited the circuit judges from charging the jury, unless the counsel differed as to the law, and should ask a charge on some point to be distinctly specified. H. & H. Dig. 493, sec. 53. A subsequent law provided that the judges should not charge the jury unless the counsel differed, and a charge should be asked on some point to be distinctly stated in writing, and it prohibits the judge from charging as to any other point. H. & H. Dig. 482, sec. 9. This law does not require the judge to put any modification that he might choose to make in writing. It would be too rigid to say that any modification, however slight, shall be reduced to writing, or the judgment will be reversed. If a party should object to such modification, he should embody it in a bill of exceptions, so that it may be seen whether it was to his prejudice. The law of 1846 requires that all charges and modifications of charges, shall be in writing, and at the request of either party the jury may take them to their room. Even if this law should extend to criminal cases, but it is not so understood, there is a provision in it which

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covers this case. The charge or modification must be in writing, unless *by the consent of both parties.* The bill of exceptions shows this consent, or rather it shows that the prisoner did not object that the modification was made verbally. In the absence of any objection appearing on the record, assent would be presumed. We cannot presume that the court violated the law. This, then, was not a question raised on the trial. The court was not asked to reduce the modification to writing until after the jury had retired; that was too late. Objections should be made at a time when they can be obviated.

It was said in argument that the tenth instruction is to be considered as having been refused, because the word "refused" is written on the margin. The body of the bill of exceptions must control; and there it is said all the instructions were given, except two, the ninth and eleventh, which were modified.

This brings us to the only remaining point which it is necessary to consider, the refusal of the court to grant a new trial, which was moved for because the verdict was contrary to the instructions, and against the evidence. Undoubtedly this court may grant new trials when there is a great preponderance of evidence against the verdict. But there is no such preponderance here. On the contrary, the evidence sustains the verdict, if the main witness, Silas, is to be believed. It is therefore resolved into a question of credibility. It was insisted in argument that Silas was unworthy of belief, because of his having made contradictory statements in his several examinations and confessions, and therefore that a new trial should be granted. The question of credibility is one which belongs so exclusively to the jury, that it would be a delicate point for a court to touch it. True the testimony of an accomplice should be weighed with great jealousy and distrust by a jury, but it is impossible to say, as a question of law, that he should not be believed. The jury are to determine that from his manner, his consistency, and other attending circumstances. They are to judge how far his testimony has been corroborated, or they may believe him if they choose without corroboration. We are disposed however, to give the prisoner every benefit which can result to

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him from a thorough sifting of the evidence, so far as we can do so, consistently with our duty.

Silas was introduced as a witness, and in the course of his examination, his voluntary confession, made when he was taken before the court of inquiry, was introduced. His testimony before the committing court in the case of Keithler, was also introduced; and lastly, his confession made since his conviction. The object was to impeach his credibility from his own contradictory statements. As might be expected, there are discrepancies. In every instance, he implicated Keithler. His statements do not vary in charging him with being the instigator and cause of the offence. His voluntary confession does contain statements which are afterwards contradicted. He then stated that Sims had cut his finger with a knife. This he afterwards contradicted. He also said he had shot Sims but once; this too is contradicted, both by his subsequent statements, and by Anna Sims. He also said that he offered to speak to Sims, before he shot him, and this is contradicted, and perhaps he contradicts himself in other points. When he was under examination as a witness on the final trial of Keithler, he stated that his mind was confused from long confinement, and he concludes his testimony by saying that he had not stated the one tenth, or one hundredth part of what passed between him and Keithler; that the murder of Sims was a continued subject of conversation. A voluntary confession is entitled to but little weight, as it is but natural that one accused of crime should endeavor to palliate his guilt by excuses. And if a different statement should be afterwards made under oath, when circumstances have changed the condition of the party, it will be with the jury to say whether they will disbelieve him on account of such discrepancies. We cannot think that this would be an unerring indication of false swearing.

The published confession of Silas, made after his conviction, is more in detail than any person's statement. It was evidently written by another, as he could not write. Variations might naturally be expected under such circumstances, and yet in the main it corresponds with his testimony.

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In his testimony given before the committing court, on the trial of Keithler, he says that Keithler first mentioned the killing of Sims to him on the evening he (Silas) left Sims. In his subsequent examination, he said it was on the next day. He then also stated that he received the cut on his finger from Sims, and with these exceptions, his testimony is not materially variant from his subsequent statements. He is contradicted in one particular by Anna Sims, a daughter of the deceased, twelve years of age. She says she was but forty or fifty yards off when Silas shot her father, and that he saw her. He persists in saying she was not there. It is possible he may not have seen her.

These contradictions doubtless had their due weight with the jury. But it is proper to observe, that when he was called to testify against Keithler, he was under sentence of death, and, as he says, without any hope of pardon. He testified therefore with the certainty of execution before him, when we must suppose all motive to tell a falsehood had ceased to have an influence.

Let us in the next place examine whether his statements, so often repeated, in regard to the guilt of Keithler, are corroborated by the other witnesses; for although he may have weakened the strength of his testimony by his contradictions, yet if he is corroborated in the main fact, his testimony was still entitled to weight with the jury.

Philip Alston, a witness on the part of the state, went to the house of Sims immediately after the occurrence. Whilst he was there, Keithler was walking the gallery, and being called in, was asked by Mrs. Sims if he had seen Silas. He replied that he had seen him half an hour since riding towards Raymond with Bankstone. He was also asked by her why he did not arrest him. He replied that he knew nothing of the matter until he came to the house. Let us contrast these statements of the prisoner with the testimony of another witness. Bankstone, a witness on the part of the state, heard the firing and went over to Sims's, and after having learned what was the matter, he went to the mill to arrest Silas. He then found Keithler,

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and told him what had occurred, and requested him to assist in arresting Silas. He replied that he would rather not, and wished Bankstone to get some other person. But upon being pressed to assist, he said he would tell Silas to give himself up, and accordingly started towards Silas in a trot, and met him at a point behind the shop, out of sight of the witness, who was some distance behind. What passed between them the witness did not know; but they met him, when Silas remarked, you have come for me. Keithler's answers to Mrs. Sims, in view of these facts, are certainly calculated to create suspicion. He knew all about the arrest of Silas, and yet he replied evasively, saying that he had seen him half an hour since riding towards Raymond. He had been informed by Bankstone at the mill what had occurred, and yet he told her he knew nothing of it until he came to the house. Why did he manifest so much reluctance in arresting Silas? And that a private conversation passed between them behind the shop is clear, from the remark of Silas to Bankstone. Silas surrendered by the advice of Keithler. These circumstances are inconsistent with the conduct of one who was acting without some secret motive, and desirous to detect the guilty. But he also stated to Bankstone, as a reason for his reluctance, that Sims had threatened Silas's life the day before. Now hear his statement made in presence of Sims. He was called in by Alston, and asked to state what threats he had ever heard. He replied, that the only threat he had ever heard Sims make was, that if he caught Silas prowling about his negro quarters at night he must abide the consequences. This does not correspond to his statement to Bankstone. If he could state to Bankstone that such a threat had been made, when it was untrue, does it not prove that threats had been the subject of conversation between Keithler and Silas; and we shall see hereafter that such was the fact.

The testimony of Mount proves that Keithler wished to give a false coloring to the affair. Mount, on Thursday evening, spoke of the murder as being a cruel and unprovoked one. Keithler remarked that the affair was not so horrid. The witness was surprised at the reply, and asked Keithler if he had

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heard any threats. He answered, that Sims had threatened that if he ever caught Silas on the plantation, he would shoot him. The witness asked, if the threat was not that if he ever caught Silas prowling about his negro quarters at night, he would shoot him? He replied, that such was not the threat. At this moment, Keithler was called into the presence of Sims by Alston, and asked what threats he had heard, when he gave an answer differing from his statement to Mount but a few moments before. To Mount he wished to palliate the offence, but was forced to tell the truth in presence of Sims.

The testimony of A. Jones is also entitled to much weight, as he relates facts substantially as Silas has done. On the evening that Sims was killed, he went to the mill, and shortly afterwards Silas rode up; they had some conversation at the mill, in which Silas told him he expected to have some difficulty with Sims. Witness went up into the mill where Keithler was; Silas soon followed, but remained only a short time, when he returned to the mill, and beckoned to Keithler, who went to him, and they held a conversation together. Silas related the facts very much in the same way, and said that the murder of Sims was the subject of conversation, and in an hour afterwards it was accomplished.

The testimony of young Dewson, who lived at the mill, is also important. Keithler and Silas slept together in the same room with the witness, and were generally together, and held many private conversations. On one occasion, when Keithler and Silas were lying under a shed together, he heard Silas say, "it will be all right to-morrow;" when Keithler answered, "you have promised that frequently, and it is not done yet." This occurred on Tuesday night. Silas mentions the circumstance, and says the answer had reference to the murder of Sims. This young man also heard Silas remark, late at night, whilst in bed, "somebody has promised me a horse and bridle to kill or beat Sims." This witness establishes, beyond doubt, a very close and confidential intimacy between Keithler and Silas. Such as to render it more than probable that Silas had communicated his design to Keithler, even if he had conceived the

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plan without Keithler's aid or advice. But when the other circumstances are considered, it is difficult to resist the conclusion that the prisoner was an adviser in the scheme.

We shall close our remarks on the testimony with that given by Amos R. Johnson. Silas sent for him to the jail, and wished him to appear for him before the court of inquiry. He stated that Sims had threatened his life, and he could prove this by Keithler. Johnson went in search of Keithler, and after some time met him coming from towards the jail, where he had probably been to see Silas. In answer to Johnson's inquiries, he stated that he could prove the threats, but did not wish to testify before the committing court, for fear it might give offence to Mrs. Sims. He wished to wind up his business at the mill, and would testify before the circuit court, and his testimony would clear Silas. He was subpœnaed, but did not attend. An attachment was taken out for him, and about the same time he was arrested on the charge, and brought to town. Standing under a tree, he beckoned to Johnson, and said to him, they had me up before Sims the other day, and examined me, but that was not a court, and I was not bound to state the truth there. On the examination Keithler was introduced as a witness for Silas, but did not testify as he had told Johnson he would, when Silas, springing up from his seat, propounded this question; "Henry, did you not tell me at the mill on Tuesday evening, that Sims had said that day 'that he would kill me on sight, without giving me time to wink?'" After some hesitation the prisoner replied, "why, Silas, you know that is not so." Silas, under excitement, repeated the question, and Keithler denied that he had so told him at the mill, but said that Sims had, that day (Tuesday) used the expression, "I will kill Silas on sight, without giving him time to wink." Now let it be borne in mind that Sims was killed on Wednesday, or rather the wounds were then inflicted. Silas testified that Keithler had communicated threats on Tuesday. Keithler told Bankstone that Sims had threatened Silas's life the day before (Tuesday.) Silas, in the manner above stated, asked him if he had not told him at the mill of Sims's threat. Keithler

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at first denied, but subsequently stated that Sims had made such a threat. Can any other conclusion be drawn from these circumstances, than that Keithler had made false representations to Silas, and that with a view to induce him to perpetrate the crime. There is something in the testimony of every witness that was examined that tends to fortify the testimony of Silas, and, when every circumstance is duly weighed, his testimony is corroborated as to the guilt of Keithler. We have entered into this investigation of the evidence to show that Silas was not entirely unsupported in his statements. Whilst there were powerful reasons to question his credibility, the verdict was not given without corroborating evidence, and must stand.

Judgment affirmed.

On the delivery of the foregoing opinion Messrs. *Davenport* and *Wharton* filed an elaborate petition and argument for a re-argument of the cause. At a subsequent day of the term, the court refused the petition, when

Mr. Chief Justice SHARKEY delivered the following opinion.

The judgment of the circuit court in this case was affirmed on a former day of the term, and an application has been made for a re-argument, which is based upon supposed errors in the decision. The points relied on for a re-argument have been discussed at some length, and the benefit of a re-argument has thus virtually been had.

The accused had been convicted of murder, and we were reluctantly compelled to affirm the judgment. The magnitude of the case had its due weight in the original investigation. Every point made in the record was very fully and deliberately considered by each member of the court. We should not, of course, have pronounced the judgment without being entirely satisfied of its correctness. No new questions are presented, and we have examined again the points pressed for a re-argument, and regret to say that we find no reason for changing our opinion. On the contrary, we are strengthened in the conviction which induced us to affirm the judgment, and on that

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account do not regret that a petition for a re-argument was presented. The grounds relied on will be briefly noticed.

It is again insisted that the indictment was defective, because it was signed by a district attorney *pro tem.* who had been appointed by the court. We held that the court had the power to make the appointment, and think so still. We did not then wish to take the ground that no signature to the indictment was necessary, save that of the foreman of the grand jury, preferring to sustain the practice as it has existed in accordance with the statutes on that subject. But we now remark, that we know of no law in this state which requires the signature of the district attorney to an indictment. The common law certainly does not; and if there be no statute which does, then it is not required at all. An indictment derives its validity by the indorsement of the grand jury, "a true bill," over the signature of their foreman. Thacher's Crim. Cases, 284; Archbold's Crim. Plead. 58; 1 Chitty's Crim. Law, 316-324.

The case of the *State* v. *Byrd* is supposed to sustain a different doctrine. It was there remarked that it was the duty of the district attorney to sign the indictment; but it was not said to be an indispensable duty. The question was not involved, and the remark was only made in argument. With great propriety the same remark might be made again. It has been the invariable practice for district attorneys to sign indictments, and we still think it a correct one.

A case in 9 Yerger has been cited. The decision seems to be predicated on a practice which has grown out of their statute. No indictment is permitted to go to the grand jury, unless the district attorney, after a conference with the prosecutor, shall recommend it. Statute Laws of Ten. 385.

The same objection was taken to an indictment in North Carolina, and the court decided the point directly, that it was not necessary that the prosecuting attorney should sign the indictment. That the common law did not require it, and there was no statute which did. If it was not necessary that this indictment should be signed, of course a useless signature did not vitiate it. Carolina Law Repository, 493.

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The second point is, that Silas was improperly permitted to testify, because the statute only renders competent one who has been convicted, but not one on whom judgment has been pronounced. We adhere to our construction of this statute. Judgment amounts to conviction, and conviction of felony, and other crimes, disables a man to be juror, witness, &c. Tomlins's Law Dictionary, 414. See also, Roscoe's Criminal Evidence, 123. We cannot doubt but what the legislature used the word "conviction" in its broadest sense, as one under judgment.

The third ground taken is, that the following charge was erroneous, to wit: "It makes no difference to the merits of this case, whether Silas conceived the design to kill Sims before his interview with Keithler or not. If Keithler encouraged him in that design by falsely stating to him threats of Sims, Keithler is guilty. We are always to consider of charges in connection with the evidence before the jury. We do not understand the language of this charge as conveying the idea that it is supposed to embrace. If Keithler was ignorant of Silas's design, then he could not be said to have encouraged him in that design. A knowledge of the design is therefore implied in the language used. So, at least, we understand it. The idea which the charge seems to us to convey is this. It is not material that Keithler should have originated the design. If Silas had previously formed it, and Keithler encouraged him to carry it out, by stating falsehoods or otherwise, he is guilty. The court said to the jury, "if Keithler *encouraged him in that design.*" In what design? The design of killing Sims. This identifies Keithler with the design of course. If Keithler had merely stated falsehoods, without knowing of the design, he could in no sense be said to have *encouraged that design.*

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JULIUS C. MONET, President of the Board of Police of Harrison County, *vs.* BENJAMIN JONES, Clerk of the Probate Court of said county.

The constitution of this state, which (Art. 4, § 20) gives to the boards of police, "full jurisdiction over roads, highways, ferries, and bridges, and all other matters of county police," does not, under the clause, "*matters of county police*," confer the right on boards of police to locate the seats of justice in their respective counties.

The term, "*county police*," in this clause of the constitution, has but little meaning in itself; and, in order properly to define it, legislation is necessary; the term is inoperative, until legislation designates its subject-matter.

The legislature, having previously located the county seat of Hancock county, elsewhere, in the year 1846, passed a law, by the first section of which, it was provided, "that the seat of justice was thereby made permanent, and located in the town of Gainesville." The other sections contain provisions, that the citizens of Gainesville should erect, at their own expense, suitable public buildings, one-third of the cost of which, should be refunded to them, &c.; and the seventh section provided the period at which all the officers of the county should remove their books and papers to Gainesville; *held*, that by this act of the legislature, the seat of justice was absolutely established at Gainesville, dependent on no condition that the citizens should erect the public buildings at their expense; and that the act was constitutional.

The fact, that the legislature has at one session established the seat of justice of a county, does not at all militate against the validity of an act establishing a different place for the seat of justice, at a subsequent session; it is a subject at all times under legislative control and discretion.

ON appeal from the circuit court of Harrison county; Hon. Thomas A. Willis, judge.

Julius C. Monet, President of the Board of Police, of Hancock county, filed his petition in the circuit court of Harrison county, for a mandamus, in which he alleges that the legislature, at its session of 1846, passed an act, entitled, "An act to

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locate the seat of justice for the county of Hancock, and for other purposes," as follows:

"Section 1. Be it enacted, by the legislature of the state of Mississippi, that the seat of justice for the county of Hancock, be and the same is made permanent, and located in the town of Gainesville, in said county.

"Sect. 2. Be it further enacted, that the citizens of the town of Gainesville, shall erect, or cause to be erected, at the expense of the citizens of said town, commodious and suitable buildings, for the accommodation of the several courts of said county, and that said buildings shall be constructed of bricks, and erected upon a square of land donated to said county for that purpose, by Charles H. Frazier, in said town of Gainesville.

"Sect. 3. Be it further enacted, that when said buildings shall be completed, and ready for the accommodation of said courts, Asa Russ, R. G. Stevenson, Enoch McFadden, Joseph Martin, and Joseph Chandler, shall constitute a board of commissioners, to examine said buildings, and costs of constructing the same, of which amount of costs, said commissioners shall make a statement in writing to the treasurer of said county.

"Sect. 4. Be it further enacted, that after said commissioners shall have examined and reported the same to the county treasurer, said treasurer shall, within ten days thereafter, give notice to the several officers of said county, who are compelled to keep their respective offices at the court-house of said county, to remove their books and papers forthwith to the buildings erected for the accommodation of the several courts; and that the courts thereafter shall be held in the said town of Gainesville.

"Sect. 5. Be it further enacted, that the treasurer of said county, shall pay over to the citizens of the said town of Gainesville, or their agent or agents, one-third of the actual cost of the construction of the aforesaid buildings, in three equal instalments of one, two, and three years, out of moneys not otherwise appropriated in said treasury.

"Sect. 6. Be it further enacted, that the receipts of said agent or agents of the citizens of Gainesville, shall be a voucher for the treasurer in settlement of his accounts.

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"Sect. 7. Be it further enacted, that should it so happen, that the public buildings above spoken of, should not be completed by the spring term of the circuit court of said county, the several courts shall be held at the usual place of holding the same, up to the spring term of 1846; then all the officers above spoken of, shall, within ten days thereafter, remove their books and papers to the town of Gainesville, to such buildings as the citizens shall have provided for their accommodation, until the completion of the public buildings above spoken of.

"Sect. 8. Be it further enacted, that if any officer or officers shall fail or neglect to comply with the requisitions of this act, they shall be liable to all the pains and penalties now imposed by law for similar misdemeanor in office.

"Passed, February 13, 1846."

That in the month of April, 1846, Benjamin Jones, clerk of the circuit and probate courts of the county, in obedience to the order, removed the books and papers of his office to Gainesville.

On the second Monday in May, the board of police convened at Shieldsborough, at the court-house; and, having heard the opinion of counsel, came unanimously to the conclusion, that this act of the legislature was unconstitutional and void; and, that Shieldsborough, the old county seat, was the county seat still. They accordingly, by virtue of their constitutional authority, so declared it, and directed Jones to remove the books and papers back from Gainesville to that place. Jones, in contempt of their order, refused to obey them. They, therefore, prayed for a mandamus, to enforce obedience on the part of Jones, to their order.

The Hon. J. M. Smiley, vice-chancellor, directed a rule, to show cause, to issue returnable to the September term of the circuit court of Harrison county.

Jones filed an answer, justifying his disobedience, under the act of 1846, locating the county seat at Gainesville. In his answer, he admits that the buildings for the courts had not yet been erected.

The petitioner demurred to the answer; the demurrer was overruled, and the petition dismissed, and an appeal granted.

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The following agreement of counsel was filed:

"In this case, by agreement of counsel, no question is presented; but as to the validity of the act of 1846, locating the seat of justice for Hancock county. If the court is of opinion, that the act is void, the opinion below is to be reversed; if, on the other hand, the court should be of opinion that the act is valid, the judgment below should be affirmed. To this question only are the arguments of counsel directed.

Hurst and *Monet*, for appellant.
W. P. Harris, for appellee.

Hurst and *Monet*, for appellant, contended,

1. That the act of 1846 was unconstitutional in terms. It manifestly designed to locate the seat of government at Gainesville only on condition that the citizens erected the prescribed public buildings; such is the interpretation of all the sections of the act when viewed in connection with the words, the context, the subject-matter, the effects and consequences, or the spirit and reason of the law. 1 Bl. Com. 40; if the county seat be moved without a compliance with these expressed conditions, the intention and will of the legislature will be violated. The conditions thus form part of the act locating the county seat; they constitute the inducement of the law, and if they are unconstitutional, the whole law is so. The conditions are such as the legislature had no right to impose; to command the citizens of part of a county to erect public buildings is a stretch of legislative usurpation, not the exercise of legislative power.

2. The second section of the act is unconstitutional, because the legislature undertakes to judge of the validity of the title to the land, direct the mode of payment, &c.; which are all matters of county police, and appertain exclusively to the board of police.

3. Locating county sites is a legitimate matter of county police, and the exercise of the powers by the legislature is an infringement on the jurisdiction of the boards of police. County police means government regulation of the county, and confers authority to administer all public matters for county purposes, of whatsoever nature. *Baxter* v. *Taber*, 4 Mass. R. 361.

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4. By the acts of 1842, p. 181, and 1843, p. 79, the legislature entered into a contract as to the site of the county seat, which is broken by the act of 1846. The citizens under those acts, in good faith, have expended money and erected public buildings; it is a breach of good faith to sustain the act of 1846.

W. P. Harris and *D. C. Glenn*, for appellee.

1. By all sound rules of interpretation the act of 1846 was an unconditional location of the county seat. The first section is positive, and the seventh section shows that the legislature contemplated a removal to Gainesville, whether the public buildings were put up or not, and fixes the period for it. The location is in express words made "permanent."

2. The argument of appellant is suicidal. If the whole act be merely a proposition to change the county seat on condition the public buildings be erected, then the argument, as to its unconstitutionality, falls to the ground, for the citizens may accept it or not, as they please, and are thus not compelled to obey the legislative bidding. But if the argument as to the unconstitutionality of the second section prevail, then the first section stands as an absolute and permanent location of the county site, unaffected by the second section if declared unconstitutional.

3. The general law (H. & H. Dig. 466) provides for the erection and repair of public buildings when there are none, or they need repair; and if the citizens of Gainesville neglect or fail to provide suitable buildings, it is the power and duty of the board of police to provide buildings under the general law.

4. It is difficult to define the exact character of the board of police, when viewed with reference to the functions they perform. Looking at the various statutory enactments which confer or regulate the powers of these bodies, we would be inclined to regard them as a kind of municipal corporation. The language of the constitution, however, seems to fix upon them the character of courts, and to confine them to the exercise of such judicial functions as arise out of the administration of county affairs. 1st. Because the word "jurisdiction" refers to the ex-

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ercise of judicial authority, and is employed in reference to courts, and not to designate the exercise of legislative or executive authority. 2d. Because the board of police are placed under the head of the judiciary in the constitution, and constitute a branch of the judicial power of the government; and, like other departments, created by the constitution, are restricted to the sphere to which they belong, by the second section second article, unless a special exception is found in the constitution. There is one special exception, and only one, and that is the power to order elections for county officers. The words "full jurisdiction in all matters of county police," are too comprehensive to be construed into a special exception, within the meaning of the constitution. The location of the place where the courts are to be holden is not necessarily a matter of county police, and certainly bears no resemblance to a judicial proceeding. It does not come within the definition of a judicial proceeding; there are no parties; there is no judgment about any matter in controversy, and by which right is determined.

5. The location of seats of justice is purely legislative, and has been so treated ever since the adoption of the present constitution. Language, however consistent and uniform, furnishes but a feeble argument in favor of a violation of the constitution, in cases where that violation is open and palpable; but in cases of doubt, where the meaning of the constitution depends on the construction of language, and the meaning of particular phrases, long usage and uniform acquiescence in a particular interpretation, furnishes the safest rule of construction. Ever since the adoption of the present constitution, from the very first legislature which sat under it, down to the last, complete control over the subject of court houses and their location has been assumed and exercised by the legislature; and so far as the boards of police have had any connection with the matter, it has been where the legislature pointed them out as bodies of men; not the tribunal itself, to carry out the details of laws passed on the subject.

6. Counties are municipal bodies, forming subordinate branches of a general system of government. A distinction has been properly drawn between municipal corporations and private cor

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porations in regard to laws passed in reference to them. It is only in cases of private corporations that laws assume the character of contracts, and in which the right to repeal or modify is denied. *Terrett* v. *Taylor*, 9 Cranch, 43; 4 Wheat. 518.

Mr. Justice THACHER delivered the opinion of the court.

A writ of mandamus was issued returnable to the circuit court of Hancock county, addressed to the defendant in error, as clerk of the circuit and probate courts of that county, based upon his refusal to obey an order of the board of police of the county, commanding him to restore the books and papers belonging to his offices to the court house in Shieldsborough, from whence he had removed them to Gainesville, in said county, and to show cause why a peremptory mandamus should not issue. Upon the return of the writ, the questions made were raised by means of a demurrer filed to the answer of the defendant to the writ of mandamus, which demurrer was overruled by the circuit court.

The constitutionality of the act of 1846, ch. 145, entitled, "An act to locate the seat of justice for the county of Hancock, and for other purposes," is the only question presented to this court, as appears by an agreement of counsel, and we are also desired, in the event our conclusions are in favor of the constitutionality of the act, to affirm the judgment of the circuit court.

The constitution, (art. 4, sec. 20,) gives to the boards of police "full jurisdiction over roads, highways, ferries and bridges, and all other matters of county police." The right of the boards of police to locate the seat of justice in each county, is claimed under its grant of jurisdiction in "all matters of county police."

The word "police," in law, is not a term of indefinite meaning, although it has several significations. It is administrative, under which its object is to maintain the order, comfort and convenience of the inhabitants of its administration; and it is judicial, under which it seeks to prevent crimes by punishing criminals. The judicial police punishes those offences which the administrative police has not been able to prevent by fit

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regulations. Strictly speaking, therefore, the term police has relation to a power of organization of a system of regulations tending to the health, order, convenience and comfort of the inhabitants, and to the prevention and punishment of injuries and offences to the public. But it must be remembered, that the constitution has elsewhere specifically confided to designated officers and tribunals, as to justices of the peace and the various courts of law, the prevention and punishment of offences against the public, and retained, as a part of the sovereignty of the state, the power to enact by the legislature such laws for the preservation of good order and good government, as it may, in its wisdom, deem suitable. It follows, therefore, that the term, as used in this connection in the constitution, conveys but little if any meaning, and in order to properly define it, legislation was necessary. Hence, it will be found, that the legislature has, from time to time, pointed out the extent of the authority so given, by confiding powers to the boards of police "in addition to their jurisdiction *specifically* vested in them by the constitution," which *specification* is a jurisdiction over "roads, highways, ferries and bridges." H. & H. 445, sec. 3, and *passim* in the laws relating to the board of police. The grant of *general* jurisdiction in matters of police to become operative, required legislation to designate its subject-matter. The conclusion necessarily is, that as the power to locate the seats of justice of the several counties, has not been confided to the boards of police by the legislature, the power still remains in that branch of the government.

It is next in order of inquiry, whether the above mentioned act of the legislature of 1846, ch. 145, locating the seat of justice of Hancock county at Gainesville, constituted a location absolutely, or only upon condition. The first and seventh sections of that act, we think, put it beyond doubt, that the location was thereby made absolute, and to take effect, at all events, ten days after the expiration of the spring term of the circuit court of that county, to be holden for the year 1846. These sections are as follows:

"1st. That the seat of justice for the county of Hancock, be,

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and the same is hereby made permanent, and located in the town of Gainesville, in said county."

"7th. That should it so happen that the public buildings above spoken of should not be completed by the spring term of the circuit court of 1846, that the several courts of said county shall be held at the usual place of holding the same up to that time. Then all the officers above spoken of shall, within ten days thereafter, remove their books and papers to the town of Gainesville, to such buildings as the citizens shall have provided for their accommodation, until the completion of the public buildings above spoken of."

The other sections of the act contain the provisions that the citizens of Gainesville shall erect, at their own expense, upon the land donated for that purpose by Charles H. Frazier, suitable brick buildings for the accommodation of the several courts of the county; that certain persons named in the act shall, as a board of commissioners, report the cost of the buildings to the county treasurer, who shall be authorized to refund to these citizens one-third of the cost of their construction; and that a neglect by any of the officers mentioned in the act, to comply with its requisitions, shall be deemed a misdemeanor in office. These provisions contain no conditions controlling the absolute location of the seat of justice at Gainesville. They simply show, whatever the fact may be, that the legislature must have made the location of the county seat upon the presumption, and in anticipation of an undertaking by the citizens of Gainesville, to erect, at their own expense, the necessary public buildings of brick, and that they provided that those citizens should afterwards be refunded one-third of the actual cost of the buildings. The act makes no conditions, but renders it imperative upon the officers to remove their books and papers after a certain period, under the pains and penalties affixed by law to a misdemeanor in office. As to the undertaking, real or supposed, of the citizens of Gainesville, we have nothing to do, only so far as it may put a condition upon the act in question, which, as we have said, it does not. If no provision shall have been made at that period for the offices, and the legislature having

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permanently located the seat of justice at Gainesville, the laws elsewhere provide for such an emergency. How. & Hutch. 466, sec. 82.

Lastly; previous acts of the legislature are relied upon as having fixed, beyond the power of change, the seat of justice of the county. Acts of 1842, ch. 60, and 1843, ch. 13. Upon this point, it suffices to say, that the present act is as fully authorized as previous acts, and upon the same principles, and that the subject is at all times at the control of legislative action and discretion.

In consequence, with the foregoing opinion, and in accordance with the agreement of counsel, we direct the judgment of the circuit court to be affirmed.

THE PRESIDENT AND SELECTMEN OF NATCHEZ *vs.* WILLIAM J. MINOR.

Irregularities of a sheriff, in giving notice of the sale of real estate by him, under execution, will not vitiate the title of a *bona fide* purchaser at such sale; nor will a total omission by the sheriff to give the notice, or his giving it in a mode entirely different from that prescribed by law, affect the title of a *bona fide* purchaser of real estate under execution, who has no knowledge of the misconduct of the sheriff.

A sale by a sheriff of real estate, is not the exercise of a mere naked statutory power, uncoupled with an interest, but is the exercise of a power conferred by the judgment and execution.

The statute of this state (Acts of 1841, p. 116,) requires the sheriff to advertise real estate levied on under execution, for thirty days, by posting up notices in at least five public places in the county, one of which shall be at the door of the court-house. That statute was adopted by the United States circuit court; and the marshal of the state, having levied on real estate under an execution in his hands, advertised it for thirty days in a newspaper, instead of in five public places in the county, as required by the statute. The purchaser brought an action of ejectment against the defendant in execution; and it was *held*, on proof of these facts, the judgment and execution being regular, that the purchaser had a right to recover the land, if he had no knowledge of the defective notice.

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The rule in relation to tax collectors' sales, is different. If the notice be irregular, the purchaser cannot recover; he must prove that the statute has been strictly complied with. The tax collector derives his whole power from the statute; and his authority must depend upon a strict compliance therewith.

It has never been decided in this state, that an administrator's vendee would be affected by any mere irregularity, on the part of the administrator, in making the sale, after a valid order or judgment condemning the land to be sold. Whether a failure by an administrator, after such order to give the notice of the sale, as required by the statute, would vitiate the sale,—*Quære?*

In error from the circuit court of Adams county; Hon. C. C. Cage, judge.

John Doe, on the demise of William J. Minor, brought an action of ejectment in the circuit court of Adams county to the May term, 1842, thereof. The notice was served on the president and selectmen of the city of Natchez, who appeared, entered into the consent rule, and plead not guilty.

A jury was impanelled, and the lessor of the plaintiff read to the jury the record of a judgment in the United States circuit court for the southern district of Mississippi, at the suit of Reuben M. Strother, a citizen of the state of Missouri, who sued for the use of James H. Leverick & Co., citizens of the state of Louisiana, against the said president and selectmen of the city of Natchez; by which it appeared that the plaintiff therein, Strother, had, on the 22d day of November, 1839, recovered a judgment against the said president and selectmen in that court, for the sum of $6507.99, the debt in the declaration mentioned, and $371 for damages; that an execution of *fieri facias* issued on this judgment, directed to the marshal of the said southern district of Mississippi, who returned the same with the following indorsement, viz.:

"Levied this execution upon the property described in the advertisement hereto annexed, on the 26th February, 1840, and before the day of sale, received a *supersedeas*, which prevented the sale. W. M. Gwin, *Marshal.*

By Aug. Lynch, *Deputy.*"

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The property described in the levy was the city-hall and the market-house. On the 25th day of November, 1841, a writ of *venditioni exponas* issued from the court, upon which the marshal made the following return: "The piece of ground described in the body of the within execution, I offered for sale at public auction, at the court-house door of the county of Adams, in the city of Natchez, between the hours of eleven and one o'clock, this day, January 17, 1842; legal notice of which sale I had given in the public newspaper called the 'Courier,' published in the city of Natchez, county of Adams, state of Mississippi. William J. Minor bid $8,500, whose bid being the highest and best bid I was offered for said property, I declared him the purchaser. ANDERSON MILLER, *Marshal.*

By his deputy, W. H. MILLER."

Upon this execution was also indorsed, by the marshal, a receipt in full of the purchase-money from William J. Minor.

The lessor of the plaintiff then read the marshal's deed for the lands purchased at the marshal's sale; in which deed the marshal recites the judgment, the levy, and states, "That the said marshal, having given thirty days' previous notice that the above described property would be sold at public auction, by virtue of said writ of *venditioni exponas*, on the seventeenth day of January, between the hours of eleven o'clock, A. M., and five o'clock, P. M., of said day, at the court-house of Adams county, did, at the time and place, offer said premises for sale, at public auction; and the said William J. Minor then and there appeared and bid for the premises the sum of $8,500, which said sum was more than any other person offered or bid for the same. Whereupon the said property was struck off to the said William J. Minor, being the highest and best bidder therefor." The deed was in other respects an ordinary sheriff's deed.

The defendant then proved, that the marshal advertised the land in the "Natchez Courier," for sale from the 2d day of December, 1841, to the 17th of that month.

This was all the proof before the jury.

The court, at the request of the plaintiff, instructed the jury,

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"that, notwithstanding the neglect of the marshal to give notice, if the jury believe the plaintiff purchased in good faith, without any knowledge or participation in such neglect, and paid a fair price for the property, the sale is valid."

The defendant excepted and sued out this writ of error.

The following errors were assigned:

1st. That the levy and deed to Minor, is, "for the piece of ground in the city of Natchez, on which is situated the market-house and city hall;" and, that said market-house and city hall, is no more subject to levy and sale, than the public jail or court-house.

2d. That the court erred in charging the jury that the sale of said market-house and city hall was "a valid sale."

3d. That the court erred also in charging the jury, said sale "was a valid sale, notwithstanding the neglect of the marshal to give notice, if the jury believe the plaintiff purchased in good faith; without any knowledge or participation in such neglect, and paid a fair price for the property."

George Winchester, for plaintiffs in error, filed an elaborate printed brief, in which he made the following points:

1. Because a judgment or execution merely voidable for error, is conclusive and binding upon the parties until reversed, and cannot be collaterally impeached, and can only be reversed between them and at the instance of a party, it follows, as a necessary legal consequence, that the sheriff has a good legal authority to levy and sell under such voidable judgment or execution; and that neither his authority, nor the title of a stranger under it, is affected by such error.

2. It is because the sheriff by a levy on goods, has the common law authority of an owner to sell, that his sale, upon a levy under a voidable judgment or execution, or, after the authority of his writ has ceased by the return, or, without giving the ten days' notice of sale, is a valid sale. *Howe* v. *Starkweather*, 17 Mass. 243.

3. If the policy of sustaining a purchaser's title at sheriff's sale, were the legal ground for supporting the validity of sales

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in the above cases, it would equally apply to sales by the sheriff, under void judgments and executions, or to sales without a levy and seizure of the goods, which are only void, for want of authority to sell in the sheriff.

4. The nature of the sheriff's power to sell goods, during the existence of an unremoved levy, is the same as any owner's power. It is an absolute common law power, subject to no directions, as to time, place, or manner of sale, or the mode of transfer, as limitations upon its exercise. *McFarland* v. *Wilson*, 2 S. & M. 284; *Clerk* v. *Withers*, 2 Raym. 1072; *Ladd* v. *Blunt*, 4 Mass. 402.

The directions of the statute make no change, in the nature of his power, from the absolute power of an owner at the common law to sell his own goods, to the limited power of an agent by statute, to sell the goods of another, the debtor. By the levy, the debtor loses the goods, the sheriff becomes the owner.

The statute is, therefore, construed merely directory to him, as an officer. "If the sale were not still justifiable at common law, the statute would have to be strictly complied with, to give any property to the purchaser." *Howe* v. *Starkweather*, 17 Mass. 243.

5. But the nature of the sheriff's power, to sell and transfer land, is the same in this state as in Massachusetts; it is the same too as a tax collector's, executor's, administrator's, or guardian's, or that of the probate court, to order a sale of land, or the power of a private agent or attorney, appointed by the owner. Like the last, it is naked, because without an interest. *Cooper's Lessee* v. *Galbraith*, 3 Wash. C. C. R. 546.

It is the limited power of an agent, invested with the power by the statute law, and not by the owner. The statute, in creating the power, has annexed to it directions as to the time, place, and manner of sale, and as to the mode of conveyance, which enter into the nature of his authority and make it the limited power of an agent by statute not coupled with an interest, to sell and convey the land of another.

6. For neither being owner himself, nor having any authority as agent appointed and empowered by the owner, he has no

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common law power to sell and convey. His power is, therefore, wholly by statute, as "it is a self-evident proposition to which the mind readily assents, that no individual or public officer can sell and convey a good title to the land of another, without the authority of express law." *Thatcher* v. *Powell*, 6 Wheat. 119; *Pickens* v. *Marlow*, 2 S. & M. 436; *Cleeve* v. *Veer*, cited in *Clerk* v. *Withers*, by Holt, 2 Raym. 1074, 1075; *Ladd* v. *Blunt*, 4 Mass. 402.

7. The marshal's authority is neither any law of congress or rule of the United States court, but is wholly the statute law of this state; for his capacity as agent of the owner, to convey real estate as well as the forms and solemnities requisite to pass the debtor's title, must be in conformity to the laws of the state in which the land is situated; and no man can gain or lose a title to land, but according to the laws of the state where the land is situate. 4 Kent, tit. *By Deed*, note; 1 Pick. 86; 9 Wheat. 565; 10 Wheat. 192–202; 6 Wheat. 577.

8. The authority contained in section 1, p. 193, of the revised code, as limited by section 20, p. 200, section 55, p. 212, of said code, and the act of January, 1841, as to the levy and the time, place and manner of sale, and also as to the conditions and mode of the conveyance, constituted the only statute authority of the sheriff, to sell and convey a judgment debtor's land, which existed in this state at the time when the marshal levied his execution in this case; and it was his levy upon the land which gave him all the authority of express law he ever had, to sell and convey the debtor's land. *Wheaton* v. *Sexton*, 4 Wheat. 503. Consequently it was the statute law of this state, as it existed unrepealed, at the time of the levy, which constituted his authority. The execution under which he levied, in this case, was not issued until after the passage of the act of January, 1841. *Eddy* v. *Knapp*, 2 Mass. 155; *Howe* v. *Starkweather*, 17 Mass. 243; Comyns's Digest, tit. *Execution*, (C. 3,) (C. 4.)

9. Being a mere agent, "invested by the statute law of the state with a naked authority to sell and convey the land of another, he must pursue with precision the course prescribed by

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the law, which invested him with the power, or his acts are invalid." *Thatcher et. al.* v. *Powell*, 6 Wheat. 119. "The law requires that every prerequisite of that power must precede its exercise, that the agent must pursue the power, or his act will not be sustained by it. *Williams* v. *Peyton's Lessee*, 4 Wheat. 77; 4 Cranch, 403; 11 Wend. 434; 7 Cow. 88.

10. It is the thirty days' statutory notice alone, which fixes the time of sale, or ascertains on which of the sale days in the year the land is to be sold; the manner of the notice is essential, because none other is a statutory notice. 7 Greenl. Me. R. 376; *Wellington* v. *Gale*, 13 Mass. 486.

11. The prerequisites of the statutory power, as to the time, place, and manner of the sale, are as essential as the sale itself, or the mode of conveyance; they are no more merely directory to him as an officer, than is a sale before the deed, or a transfer by deed. Entering into the nature of the marshal's authority, and a compliance with them being an essential part of the purchaser's title, they are no more to be presumed from the official character of the sheriff, than in case of a sale and deed by a tax collector, executor, administrator or guardian, all of whom are equally sworn officers, and as much bound by the directions of the act of 1841, in which they are embraced with the sheriff. They are no more to be presumed here, than in Massachusetts. It is the same with the limited power of the sheriff to sell, as with the limited power of the court to order a sale. The sale in the one case, like the order in the other, must be proved to conform to the limited power, or it is not supported by it. It is not a question of compliance with the duties of his office under a statute, merely directory to him as an officer, but a question of passing the debtor's title, pursuant to a limited power given to him by statute, as agent of the owner, and under which power the purchaser derives title from the owner. The rule is, as in all such cases of a limited power, that "the facts which gave the marshal power to make the deed, transferring the debtor's title to the purchaser, must appear." 6 Wheat. 119. The purchaser must prove a title under the limited power of the agent, or he shows no title. A sale under the power, and

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pursuant to it, is a necessary link in the chain of his title. 4 Wheat. 77. Recitals in a void deed by an agent, are not evidence against the principal. A sale according to the directions of the act, must precede the marshal's deed to pass the debtor's interest. Sec. 55 Rev. Code, 212.

The deed is void, if a sale according to the statute do not precede it; and recitals by an agent, in his void deed, are not evidence against his principal.

12. The express words of the statute, are "where lands shall be sold, according to the provisions of the act," then "the sheriff shall execute such deed as may be necessary and proper, to vest in the purchaser all the right, title, interest, claim and demand of the debtor, which he had in and to such land." Sec. 55, Rev. Code, 212.

This is a naked power, without an interest. The sheriff is a mere agent, and has merely a naked power to transfer the debtor's interest to the purchaser, when a sale has been made "according to the provisions of the act."

Lastly, it follows that the court below erred in charging the jury, that the marshal's sale and deed, without the thirty days' notice, required by the statute, passed a good title to the land of the city to Minor.

Thomas Reed, solicitor for the city of Natchez, made these points:

1. This property in suit is not liable to seizure and sale; because it is a necessary public building, erected for the convenience of the inhabitants of Natchez. Willcock on Corp. 175; 2 Bacon's Ab. tit. *Corp.*; 13 Serg. & Rawle, 210.

2. Towns and cities are public corporations. *Terrett* v. *Taylor*, 9 Cranch, 43; 4 Wheat. 669; and 2 Kent's Com. 222.

3. They are liable to indictment for nuisance, if they permit the free use of the public property to be obstructed. *State* v. *Mayor of Clarkville*, 5 Humph. 154; 2 Hawks. 698; 2 Chitty, 566–568.

4. It is unconstitutional to destroy the right of the city to levy a revenue, or take away one of the means by which the revenue is usually raised. Federalist, 112, 117, ed. 1845;

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3 Kent, 367; *Clarke* v. *City of Washington*, 12 Wheat. 64; 4 Ib. 569.

5. This property has been dedicated to the public, and therefore cannot be liable to seizure and sale; it cannot be alienated by any act whatsoever, but remains to the public use so long as the corporation is in being. 3 Kent, 450; *City of Cincinnati* v. *White*, 6 Peters, 431; 20 Wend. 119; *McConnell* v. *Town of Lexington*, 12 Wheat. 582; 3 Ver. 530; *New Orleans* v. *United States*, 10 Peters, 662.

6. The plaintiff cannot recover the possession; because this property cannot be held by a private individual, it is public property. *City of Cincinnati* v. *White*, 6 Peters, 431; *Stiles* v. *White*, 4 Day, 328; Adams on Eject. 32; Starkie, Part IV. 506, 507.

7. This property is held in trust by the city for the use of the public, and no act of the city authorities can deprive the public from the use thereof. *Clarke* v. *Corp. of Washington*, 12 Wheat. 54; *Barclay* v. *Howell's Lessee*, 6 Peters, 507.

8. This is not the proper remedy to coerce the payment of a debt due by a public corporation; it is by *distringas* and sequestration; or the writ of *mandamus*. 2 Bacon's Ab. tit. *Corp.* E. § 2, and notes; 2 Ib. tit. *Execution*, C; 13 Serg. & Rawle, 210; 25 Wen. 458; 1 Serg. & Rawle, 474; 10 Wen. 363-393. See also the case of *Board of Police* v. *Grant*, decided this term.

Montgomery and *Boyd*, for defendants in error.

1. In the statute regulating advertisements by sheriffs it is evident the author had in his view the distinction between *negative* and *affirmative* statutes; language in the affimative must be very definite, and repugnant to all former laws, to constitute a condition precedent, or imperative rule. 4 Burr. 497; 7 Barn. & Cres. 12; 8 Ib. 29; 9 Dow. & Ry. 772; 11 Cok. R. 63, *a*, *b*; *Planters Bank* v. *State*, 6 S. & M. 628-632.

2. Affirmative statutes are merely directory, and though the officer cannot depart from them without responsibility, yet those dealing with him will be protected. 9 Cranch, 98; 5 How. (Mi.) R. 763; 4 Ib. 42; 5 Monroe, 160; How. & Hutch. 627,

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633, 642, 644; Rev. Code, 193, 194, 200, 212, are all affirmative statutes.

3. All the cases cited against the validity of the sale may be classed under three heads. 1st. Such as concern the titles derived from sales for non-payment of taxes; as 4 Cranch, 403; 4 Wheat. 77; 7 Cow. R. 90; 6 Wheat. 119; 4 Munf. 430; 4 Rand. 585; or 2d. Such cases as are governed by peculiar statutory regulation; as 4 Martin's La. R. 513. See Civ. Code, Art. 641-725, 667-670; 11 Martin, 606-711; 7 Greenl. 376; 2 Stat. of Maine, 388; 9 Mass. 96, 242; 11 Ib. 165; 10 Ib. 314; 1 Ib. 88. 3d. Private sales by persons acting under statutory powers, as 1 How. (Mi.) R. 561: 2 S. & M. 529.

4. The distinction between the sheriff's powers over lands and chattels, contended for by counsel for the appellants, has no distinction in the statutes. The counsel traced the history of the statutes on the subject of sheriff's sales in this state, and argued that it was evidently the design of the legislature to reduce real estate, as to the payment of debts, to a level with chattels. *Andrews* v. *Fleming*, 2 Dallas, 93, 94.

5. The distinction between sales of personalty and of realty. That in the former the sheriff has power, coupled with an interest, and in the latter a mere naked power is not tenable. In both he sells by the statute; in each he must have a judgment and execution, and in both he receives the money, and holds it for the judgment creditor, and thus it is a power coupled with *a trust*, in each case. 2 Story's Eq. § 1061.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This case was before the court on a former occasion, and is reported in 4 S. & M. 602, and it presents again the same question that was then decided. It was then raised by Minor, the plaintiff below, and decided in his favor. When the case was remanded, the circuit court conformed to our decision, and the defendant below excepted, and now brings up the case.

The action is ejectment. The lessor of the plaintiff derives title under a sale of the premises made by the marshal, under an execution against the city of Natchez, from the United States

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court. The sale, it is said, was void, and passed no title, and on this ground a recovery is resisted. The defect consists in this; the law of the state requires that the sheriffs in selling land under execution shall give thirty days' notice thereof, "by posting up such notice in at least five public places in the county, one of which shall be at the court house door." Acts of 1841, 116. Proof was offered to show that the marshal had given notice by advertisement in a newspaper; and the court instructed the jury, that notwithstanding the neglect of the marshal in this particular, the sale was valid if the purchaser had no knowledge of such defective notice, and paid a fair price for the land.

When the case was first brought up, the judgment was reversed, because the circuit court had decided the notice to be insufficient. The case was argued at great length, and maturely considered by the court, with all the lights from authorities that are now before us. We were not so fortunate, however, as to give satisfaction to the parties concerned by the decision, and it has been re-discussed in an argument which displays more ability than respect for the previous decision of the court. It is possible the decision may be erroneous, but it would be well for counsel, in finding fault with decisions, to be sure that they see the question through unbiased mediums, and that the error is apparent to all.

It is one of those questions which must be decided by the analogies of the law, as the direct authorities are somewhat conflicting, and in such cases it is often difficult to draw a conclusion on which the mind can rest with entire confidence in its correctness. This is evident, since we find courts of high respectability that differ on it. I am free to confess that the able argument has tended to shake my confidence in the former opinion, but here a dilemma is presented; is it clearly shown that the other decision is wrong? and if not, will it do to change it on mere doubts? No one would more readily confess an error, or change an opinion. It is a weakness to adhere to error, from which I trust this court is exempt. But the argument, able as it is, has not satisfied my mind that the decision should be

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changed. In doing so, to say the least, I should still entertain doubts, and very serious ones, as to the correctness of a different decision.

The position mainly relied on is, that the sheriff sells land by a naked statute power, which must be strictly pursued in every particular, or no title will pass. On the former occasion it was fully conceded, that if this position was a correct one, the conclusion might be also correct; but I repeat, that the truth of the proposition is not admitted. We are not distinctly informed what is meant by a naked statutory power. It would seem to mean a power derived exclusively and directly from a statute, without any other agency, or the action of any tribunal; such for instance as the power of a tax collector to sell for non-payment of taxes. In that sense, is this power of sale a naked statute power? Does the sheriff look to the statute, and the statute only? And what does Chancellor Kent mean when he speaks of title to real estate by execution? Why did he not class it as a title by statute? The sheriff does not derive his power to sell land from this or any other statute, but from the execution. By the first section of the act in relation to executions, (H. & H. Dig.) 627, every person who has recovered a judgment against another, is authorized to sue out a *fieri facias* against the goods and chattels, lands and tenements of the debtor, and from this clause of the statute originates the power to sell land for debt; and if the statute now under consideration were swept from the statute book, the sheriff would still have power to sell land by virtue of an execution. The execution issues, it is true, by virtue of the statute, but it is a power given to the plaintiff, and when he issues it, it is a command to the sheriff to finish the judgment of the court.

If the sheriff sells land by a naked statute power, we might ask to be referred to the statute. There is none which directly confers this power as a substantive power, but it exists only in the authority conferred on the plaintiff so to issue his execution. Suppose the plaintiff should choose to sue out his execution against the goods only, would the sheriff be authorized in such a case to sell land? I apprehend not. He cannot go beyond the com-

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mand in the execution. It is said in argument, that "when the court errs in its jurisdiction or authority to render a judgment, or through its clerk, to issue a writ, such judgment or execution is void; and a sheriff derives no authority under them, but his sale and all other acts are void." "But where the court has authority to render the judgment, or issue the process, and merely errs in its judgment; or the clerk mistakes some formal direction in issuing the process, not affecting the authority of the court to issue it, there the judgment and execution are only voidable, and until reversed for error, are valid, and *convey a good authority to the sheriff, whose acts under it are as valid as if they were not voidable for error.*" Here is a full concession in a very correct argument, that the sheriff derives his authority from the judgment and execution, and I cannot see how that can be called a naked statute power, which must be preceded by a judgment which the court has authority to render, and an execution which it has authority to issue, and which must come to the hands of the sheriff before he can sell. It is important to be observed that the judgment is a lien on land as well as goods. By it the plaintiff acquires an interest. The execution is the authority to enforce that lien — it is a command to the sheriff to execute the judgment. The law declares how the authority shall be exercised, or how it shall not. It is directory or it is prohibitory. If the sheriff do a thing which he is prohibited from doing, his acts are void; he has done that which the law does not allow to be done. But if he do that which the law allows to be done, but deviates in the manner of doing it, he is responsible, but his act is not void, as to *bona fide* purchasers at his sales.

It is conceded, that as regards personal property, an irregularity in giving notice would not vitiate the sale, because it is said he sells that under the common law, by virtue of his possession as owner. To my mind this is virtually giving up the question, as I can draw no solid distinction between the sheriff's right to sell land or goods. If there were no statute, he could sell goods by the common law, and could not sell land. But the same statutes authorize and regulate the sale of both. Both

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laws cannot be in force. The statute repeals the common law when it directs the mode of sale. It will not do to say the statute may be disregarded and the common law followed, and I am unable to see any good reason why the law should be less rigid in divesting the title to personal property than to land. We have no feudal policy which prohibits the sale of land, and although the ownership of land may in some instances be more favored, yet when the same law has directed the same mode for divesting the title to each, the ceremony can no more be dispensed with in the one case than in the other. It is said, the sheriff must sell personal property as owner, because he may sell after he goes out of office. The true reason is overlooked in the effort to draw a distinction. If this were so, it would be immaterial whether the sheriff had acquired possession under a void or a valid judgment. But the true reason is, that an execution is an entire thing, and when the sheriff has a right to seize goods, he may complete the execution. And in *Wheaton* v. *Sexton*, 4 Wheat. 503, it was decided that he had a similar power over land. And in that case the court said, "the purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal." The law of this state treats real and personal property alike as to their liability for debts, and the admission that a sale of personal property would not be invalidated by any irregularity in the notice, weakens very much the argument of counsel for plaintiffs.

The authorities cited are very much the same that were referred to on the former argument, and have been re-examined with great care. The Massachusetts decisions were made under a statute which differs very much from the statute here. It points out specifically what facts the officer shall certify in his return, and when the return is so made it must be recorded, and constitutes part of the record evidence of title. In *Wellington* v. *Gale*, 13 Mass. Rep. 483, it was decided, that a defect in the return was fatal to the title. The case was this — an equity of redemption had been sold under execution. The demandant produced the judgment and the execution, the offi-

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cer's return and the deed. It did not appear by the return, in what manner notice was given, nor that the judgment debtor had been notified, and for this it was objected to; the court said it was undoubtedly defective, nor could it be cured by proof of the necessary facts, because everything essential to a title under the statute ought to appear of record, and no parol evidence could be admitted in lieu of the return of the officer. The point decided was on the sufficiency of the return, which did not comply with the statute, and as it constituted a record link in the chain of title, it could not be supplied by parol testimony. The notice was probably given, but that was not allowed to be shown. How different is the objection in this case; it is not on the return; not on a defect to the paper title; that is complete; but it is because the lessor of the plaintiff does not bolster up his complete record title by parol testimony, which is the very thing the court in Massachusetts would not permit to be done. The validity of a sale would scarcely be doubted here in consequence of a mere informality, or a defect in the officer's return, because there is no statute which directs how it shall be made. Thus, in *Wheaton* v. *Sexton*, the supreme court said, "whether the marshal sells before or after the return day; whether he makes a correct return, or any return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return."

In *Davis* v. *Maynard*, 9 Mass. R. 242, the objection was also to the return, because it did not conform to the statute, and for that reason it was held bad, and the court further decided that it could not be aided by parol proof of the facts that it should have contained.

The case of *Eddy* v. *Knap*, 2 Mass. Rep. 154, was this. It appeared by the return, that the sheriff had appointed *two* appraisers, but he did not certify that the defendant had failed to choose one. The law required the land to be appraised by three appraisers, one to be chosen by the judgment creditor, one by the debtor, and one by the officer, and if the debtor failed to appoint, the officer had the power to appoint two, and it was because the return did not show that the debtor had been re-

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quested to appoint, and had failed to do so, that it was held to be defective. For anything that appears, the debtor had been requested to appoint, and had failed to do so, but that was not the question; and it is manifest that all these cases were decided, not on the improper conduct of the officer in selling, but on the sufficiency of the facts certified in the return; no question was made as to a failure to comply with the law in selling.

The case of *Williams* v. *Amory*, 14 Mass. R. 20, was also one which depended on the sufficiency of the return alone; not on the doings of the sheriff in making the sale. The law required that the appraisement should be made by three discreet, disinterested freeholders of the county, and the sheriff failed to certify that they were discreet, disinterested freeholders, as the law required he should do, and his return was held to be defective. The court said, "that everything made necessary by the statute to pass the property, either in land or chattels, must appear by the return of the officer to have been done." The court seems to have placed land and chattels on the same ground.

The case of *Howe* v. *Starkweather* has been cited. It decides that a mere irregularity of the officer will not vitiate the sale of chattels, and the following language of the court is pertinent to the point under consideration. "Purchases (said the court) would not be made, and the interest of both debtor and creditor would suffer, if sales made by one having lawful authority, and appearing to have exercised it lawfully, should be avoided on account of some irregularity which could not be known at the time."

This same degree of strictness was held by Judge Story to be necessary in the case of the *United States* v. *Slade*, 2 Mason, 71, because, said he, "the general rule is, that where a party takes by a statute extent, or title on record, everything essential to that title must be apparent upon the record."

As these cases were all decided on the sufficiency of the return, which constitutes part of the record title, they are certainly not direct authorities to prove that a sale will be invalid if the sheriff fail in doing that which he is not bound to certify

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to in his return, and which depends on parol proof. An argument may be drawn from them, it is true, that if the officer is required to return all his doings with so great a strictness, he must first do the things in order to enable him to return the fact. But this answer is suggested. Suppose that the officer had failed in any of the particulars required by the Massachusetts statute, and had notwithstanding certified falsely that he had done all that was required, would the courts there, in trying title, have listened to parol proof to show the falsity of the return which had been placed on the record? This would be to try a collateral issue. It is more than probable they would have left the party to his remedy against the officer.

A similar statute exists in New Hampshire, and the decisions are very much in accordance with those in Massachusetts. In *Rand* v. *Hadlock*, 6 N. H. Rep. 514, it was decided, that when a creditor extends his execution upon the land of his debtor, the execution with the doings of the sheriff, must be returned to the court from which it issued, that the extent may become a matter of record. It seems there too to constitute a part of the record title.

The officer is required to pursue a like course by the statute of Connecticut. The case of *Metcalf* v. *Gillet*, 5 Conn. R. 400, was an action of ejectment, in which the plaintiff claimed title by virtue of the levy of an execution. The law required that appraisers should value the land, and certify the value to the officer in writing signed by them, and that the officer should so state in his return. The land had been regularly appraised and certified to as the law required, but the officer failed to state in his return that the appraisers had returned to him their appraisement in writing, signed by them. An offer was made to prove that they had done so, but this proof was rejected, and the return held to be defective. The statute was said to be a law of evidence; that the written evidence of appraisement was indispensable, and as necessary under the statute concerning executions, as the same species of evidence is under the statute of frauds, and for the same reason.

The case cited from Greenleaf's Maine Reports, decides that

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the officer in selling land, must give the notice required by the statute, or his sale will not be valid. It is the only direct authority on the point that has been cited, and is entitled to great weight. The court gave no other reason for the decision, however, than that the statute required the notice.

As to the case of *Thatcher* v. *Powell*, so much relied on, it arose out of a tax-collector's sale, which, as I think, differs materially from a sheriff's sale, because, as was before stated, the one derives his whole authority from the statute; it is a naked statute power; the other derives his authority from the execution, emanating on a judgment which is a lien on all the property of the defendant. In the case of *Thatcher* v. *Powell*, it is true, there was an order of court, which is not generally required in sales for taxes. But it was not only the order of a court of limited jurisdiction, the judgment itself was void for want of jurisdiction. The reasoning of the court must be supposed to have been given in view of, and as applicable to the case before it. As an evidence of this, the reasoning pressed to the extent desired, would conflict with the reasoning of the same court, in *Wheaton* v. *Sexton*.

The cases of *Osborne* v. *Woodson*, Hayw. Rep. 32; *Jones* v. *Fulgham*, 2 Murphy's Rep. 364, and *Turner* v. *McRea*, all decide directly and pointedly that a sale of real estate is not void, because the sheriff has failed to give the requisite notices. But it is said they are not based upon sufficient legal reason or authority to entitle them to any weight. They were made by courts of high respectability, and in point of legal reasoning, will compare very advantageously with the case in Maine Reports, which is the only one that decides the same point directly the other way. And to these may be added the case already cited from 3 Ohio Reports, which decides that if the sheriff omit to make the appointment, the purchaser is not affected by it. The cases before cited from the Virginia and Kentucky Reports, need not be again referred to. See also 3 Humph. Rep. 76; 7 Iredell, 151.

In those states where there are statutes which expressly require the officer to return all the facts, and also require that the

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return should be made a matter of record, we can see a reason for the degree of strictness which is required. The return constitutes part of the record title, and in many instances it seems to constitute the only title which the purchaser receives. But such a rule does not prevail here, nor is such a construction in harmony with the law of titles to real estate. These titles must be in writing, and it would seem inconsistent to require a party to support his title by parol proof, which would be necessary in all titles derived from sheriffs, if the purchaser is bound to prove that notice was given according to the statute.

But it is said there is no reason for a distinction between sales made by sheriffs and those made by tax collectors and administrators, and in cases of the latter description, the purchaser is bound to prove that the statute has been strictly complied with. In regard to tax collectors' sales, the points of difference are obvious. His whole power is derived from the statute, and his authority depends upon a strict compliance with the statute. The strictness requisite in such cases has its origin in that great fountain of the law which regulates powers. A special or limited power must be strictly pursued, but more latitude is allowed in the exercise of a general authority. But there is a misconception of the decisions with regard to sales made by administrators, so far at least as the decisions in this state are concerned. Administrators are only authorized by law to sell the land of their intestate in certain specified cases. The probate courts, in granting a license or order to sell, exercises a special jurisdiction. It is necessary with regard to all courts of that description, that everything must appear upon the record which is necessary to give jurisdiction. The probate courts cannot order a sale of real estate except in those enumerated cases, and then the jurisdiction must be exercised in a particular manner. First, the necessity of the sale must be made manifest, and then all parties interested must be cited in a particular manner, before an order of sale can be made; and as the citation is requisite to give the court jurisdiction, the record ought to show a compliance with the law, otherwise the judgment of the court is void. And all the cases that have

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been decided by this court, from *Campbell* v. *Brown*, 6 How. 106, down to *Laughman* v. *Thompson*, 6 S. & M. 259, were decided on the ground of *a want of jurisdiction in the court*, because the record did not show the requisite citations to parties interested. There is no case which turned on the regularity of the administrator's advertisement and sale, after a valid order or judgment condemning the land to be sold. The cases decided are like the sales of a sheriff under a void judgment, and it has yet to be decided, whether an administrator's vendee is to be affected by any mere irregularity in the administrator, in the manner of making the sale. This question was incidentally touched in *Smith* v. *Denson*, 2 S. & M. 326, and it was said the proper time to raise such an objection to the validity of an administrator's sale, was when he made his report, and asked to have the sale confirmed by the probate court, such confirmation being necessary.

Judgment affirmed.

Mr. Justice CLAYTON delivered the following opinion.

When this case was formerly before this court, it did not appear, from the proof, that the marshal had not given the notice of sale required by law. I then reserved any opinion, as to the effect of a sale made by a sheriff or other officer, when it appeared the required advertisements had not been given. In the absence of such proof, I regarded such sale to be *prima facie* valid. It now appears affirmatively, that the notice was not given. If I had not, on that occasion, reserved the point for further consideration, I should now add nothing to what has been said by the chief justice. I have examined the point with much care and attention, and I concur in his conclusion.

In England, lands were not the subject of sale under execution. In some of the older states of the Union, this is still the case; and in others, the principle on which such sales should stand, is not clearly defined. But in the new states of the South and West, where few fetters or restraints exist upon the free alienation of property, sales of the same character with this are uniformly supported.

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The statute in this state does not declare, that sales by sheriffs not made in pursuance thereof, shall be void. This is a material circumstance in the construction. *Voorhees* v. *Bank of United States*, 10 Peters, 471. That it should have a material influence and bearing is settled in Tennessee. In that state, there are several statutes regulating sales of land under execution. Some of them declare that the omission to give the required notices shall make the sale void; others do not contain this provision. If, under the former class of statutes, the sheriff sell without having given the notices, the sale has been always declared void; if under the latter, the notices have not been given, the sale has been sustained, and the sheriff rendered liable to the declared penalty. *Trott* v. *McGavock*, 1 Yer. 469; *Jones* v. *Planters Bank*, 3 Hum. 79. In New York, under a statute, declaring a penalty for a sale contrary to its provisions, the only effect of a non-compliance, when the purchase is *bona fide*, is to subject the sheriff to the penalty prescribed. *Boyd* v. *Jones*, 6 Wend. 522; Allen on Sheriffs, 184 - 424.

On the subject of such sales in Kentucky, it is held, "that there is a clear distinction between a sale by a sheriff without authority, and one where there is an authority not strictly pursued; in the latter case, the sale is not void. *Patterson* v. *Carneal's heirs*, 3 Mar. 619. In *Linthicum* v. *Dougherty*, 8 Dana, 200, it is said, in a case of gross abuse of discretion, and authority on the part of the officer, the irregularity would be ground to set the sale aside upon motion, but would not render it *void*." See also, 6 J. J. Marshall, 237; 1 B. Monroe, 240.

In Alabama it is decided, that a sheriff's deed cannot be collaterally impeached for any irregularity in his proceedings; all that is essential in such case is a judgment, execution thereon, levy and the sheriffs deed. *Ware* v. *Bradford*, 2 Ala. Rep. (N. S.) 682.

In a case which went up from the District of Columbia, the supreme court said, "the purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal." *Wheaton* v. *Sexton*, 4 Wh. 506.

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In North Carolina, a purchaser at sheriff's sale of land, under execution, is only bound to show a judgment execution and sheriff's deed. He is not bound to show a levy by the sheriff, as against the defendant in the execution. *Doe on dem. McEntire* v. *Durham*, 7 Iredell, 151. In South Carolina, it is held the same rule prevails in reference to both real and personal estate. *Gassaway* v. *Hall*, 3 Hill's S. Car. Rep. 289.

In Indiana, it is held, that a purchaser at sheriff's sale, who pays his money and receives a deed from the sheriff for the land levied on and sold, cannot be prejudiced if the sheriff make an imperfect return, or if he make no return at all. *Doe* v. *Heath*, 7 Black. 156. The same doctrine is recognized in Illinois. *Bybee* v. *Ashby*, 2 Gilman, 166.

In Ohio, they have a statute requiring confirmation of a sheriff's deed, and without such confirmation, the deed would be void. *Lessee of Stall* v. *McAlester*, 9 Ohio, 21. After confirmation, if the notice required by law has not been given, the title of the purchaser will not be affected. *Allen's Lessee* v. *Parish*, 3 Ohio R. 187; *Boal* v. *King*, 6 Ohio, 11.

In Arkansas, it is held, that there is a peculiar propriety in entering a motion to set aside an irregular sale, before the rights of the parties have become fixed under it. The court says, "upon such motion, all parties interested can be heard — the court will duly consider their rights and interests, and will make such order and decision as accords with law, and the justice of the case. If the sale be set aside, the purchaser acquires no title to the property, but is entitled to a return of the purchase-money." *Whiting & Slack* v. *Lawson*, 1 English Ark. Rep. 427. So in Missouri, *Reed* v. *Austin's heirs*, 9 Mo. 731.

These cases rest upon the general principle of reposing faith in the acts of ministerial officers, where no partiality or corruption is shown, and no collusion with the creditor or the purchaser. They do not apply, if the conduct of the purchaser be fraudulent. They rest also upon the policy of the law, to encourage purchasers at execution sales, and to make the property bring as much as possible, by throwing every reasonable protection and guard around the rights of the purchaser.

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They present such a mass of authority, that I have no disposition to place myself in opposition to it, and I concur in the opinion that the judgment be affirmed.

Mr. Justice THACHER having been counsel in the court below, gave no opinion.

THOMAS W. BROWN *vs.* JOHN DOE, ex dem. NEAL BARTEE.

Where the plaintiff, in an action of ejectment, claims title under a deed of trust, executed by a third party, in his favor, and the defendant claims title under a sheriff's deed of the interest of such third party, it is not necessary for the plaintiff to introduce proof to establish the consideration on which the deed of trust was executed; it will be *prima facie* valid; if the defendant seeks to impeach it he must do so by proof.

In February, 1839, T. executed a deed of trust to W. as trustee, to secure the payment of a sum of money to B. In April, 1839, a judgment was obtained against T., and, under execution on this judgment, R., in 1842, bought the property conveyed by the deed of trust. In May, 1839, T. executed a deed in fee simple to B. of the same property. In 1842 W., the trustee, sold the property under the deed of trust, and it was bought by B., who sued R. in ejectment for the property; *held*, that the absolute conveyance by T. to B., in May, 1839, did not vest in B. the legal title, and thus merge the deed of trust; that T. had but an equity to convey to B., and by his deed he only conveyed that equity. The perfect, legal title was in W., the trustee, and never passed out of him until the sale under the deed of trust, by which B., having before the perfect equitable, became also the owner of the perfect legal title; and therefore no title passed to R. by the sheriff's deed.

Where the grantee, in a deed of trust, subsequently conveys the property granted, directly to the *cestui que trust*, the deed of trust is not thereby extinguished, merged or rescinded; parties holding mere equities can only dispose of equities, they cannot affect the legal title.

The execution, by the grantor in a deed of trust, of an absolute deed, by which he conveys the property formerly conveyed in trust, absolutely to the *cestui que trust*, is not a *payment of the deed of trust;* the absolute deed

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only operated to extinguish the grantor's interest; the legal title still remained in the trustee.

Where a sale takes place under a deed of trust, the purchaser acquires that title which the grantor in the deed of trust had at the time it was executed; and if judgments have been obtained against the grantor, since the execution of the deed of trust, they bind only the grantor's equity, which the judgment creditor might whilst it existed have appropriated, by the use of proper means.

In error from the circuit court of Lowndes county; Hon. Francis M. Rogers, judge.

Bartee instituted his action of ejectment, for the recovery of lots 3 and 4, in square 9, in the town of Columbus. The declaration was served on E. C. Eggleston, as tenant in possession. Subsequently, Thomas W. Brown was admitted to defend as landlord.

At the October term, A. D. 1846, the cause was tried before a jury, and a verdict rendered in favor of the plaintiff. At the trial the plaintiff read in evidence to the jury, 1st. A deed from Samuel M. Turner to Paschal B. Wade, as trustee, executed on the 21st day of February, A. D. 1839, to secure Bartee in the sum of fifteen hundred dollars. 2d. A deed from Wade, as trustee, to Bartee, executed on the 21st of March, 1842; both conveying the property in controversy. Bartee then introduced J. B. Wade, who testified that he was the trustee in the deed, that he advertised and sold the property according to the provisions of the trust deed; that he paid rent to the Trustees of the Franklin Academy, in the year 1839, and was of opinion, in the year 1840, that Eggleston was in possession at the commencement of the suit, and that Turner was present at the time of the sale under the trust deed, and made no objection thereto.

The defendant's counsel moved to exclude the deed of trust from the jury, because there was no proof of the validity of its consideration. The motion was overruled.

The defendant then read to the jury a deed executed on the 11th day of May, 1839, by Samuel M. Turner to Neal Bartee, purporting to convey the property in controversy in fee simple. It was proved by the records, that on the 9th of April, 1839, in

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the county of Lowndes, a judgment was rendered in favor of James Owen against one William Collins and Samuel M. Turner, for the sum of $62 1.25 damages. That execution issued thereon on the 19th of February, 1842, and was levied on the property in controversy, which was sold to Thomas W. Brown, for the sum of twenty-one dollars, on the 4th of April, 1842. The sheriff's deed to Brown was also read.

The defendant proved by George M. Mullen, that he was Treasurer of the Trustees of the Franklin Academy, in the years 1840, 1841, and 1842; that Neal Bartee paid the leases for lots 3 and 4, during those years; that Bartee's name was substituted on the treasurer's book as the owner of these lots, in place of Samuel M. Turner. That it was not the custom of the treasurer to substitute the name of another for that of the owner paying leases, without his orders.

Levi Donnell testified that he rented the premises in dispute, in the year 1840, from Neal Bartee, as Bartee's property; that Bartee had a well dug on the premises in that year; that he paid the rent for the premises in dispute to Neal Bartee, and took a receipt for the same.

Thomas E. Bell testified, that in the year 1841 he rented the premises in dispute, from Bartee, and gave his obligation payable to Bartee for the same; that he paid a part of the same; that Bartee had his horse attached for the balance; that in a conversation with Bartee, the latter told him the property once belonged to Turner, and that Bartee offered to sell it to him.

Edward C. Eggleston testified that in the year 1842, Bartee told him that he had seen deeds for the property in dispute, a trust deed, and an absolute deed.

There was other testimony, not, however, material to the issue.

The defendant asked the court to instruct the jury,

1. That unless the jury believe, from the evidence, that the defendant was in possession of the premises at the beginning of the suit, they must find for the defendant; also when a legal and equitable title are united the equitable title is merged in the legal. This was given by the court.

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2. That when a deed of bargain and sale is admitted to record on the acknowledgment of the bargainor in court, and the bargainee enters on the premises after the purchase, and claims under the deed, that the deed is good in law as a deed delivered. This was also given.

3. That a *cestui que trust*, for whose account a trust deed has been executed, may take an absolute *bona fide* conveyance of the trust estate, and the latter becomes merged in the former, unless the contrary is at the time declared not to be the intention of the parties. This was refused.

4. That if the jury believe from the evidence, that the trust deed to Wade as trustee, was paid or extinguished by the execution of the absolute deed from Turner to Bartee, that they must find for the defendant. This was also refused.

The plaintiff asked the following, which were given.

1. That if the jury believe from the evidence, that, after the exclusion of the deed in trust, Turner conveyed the whole equitable estate to Bartee, yet that would not so extinguish the original lien as to let in judgments junior to the deed in trust, unless it be shown that the deed in trust was satisfied.

2. That even if Bartee accepted the absolute deed, such acceptance was not an extinguishment of the deed in trust, unless it was the intention of Bartee that the deed in trust should be extinguished by it. And even if Bartee accepted the absolute deed in payment of the debt secured by the deed in trust, yet his title would have relation back to the time the deed in trust was executed, and would exclude the lien of the judgment entered up, after the deed in trust was executed, and, if the jury believe that Brown's judgment was entered up after the deed in trust was executed, they must find for the plaintiff.

Brown sued out this writ of error.

Boykin and *Crusoe*, for plaintiff in error, contended,

1. That it was incumbent on Bartee to prove by other evidence than the mere recital of the deed of trust, that the consideration was *bona fide* and for value. *Doe ex dem. M'Ginty* v. *Meeres*, 10 Ala. R. (New Series) 139; *McCain* v. *Wood*, 4 Ala.

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R. 258; *Branch Bank* v. *Kinsey*, 5 Ib. 9; *Graham* v. *Lockhart*, 8 Ib. 23.

2. That the court should have given the instructions refused; that the equitable and legal title uniting, the former was merged in the latter. *Standifer* v. *Chisholm*, 1 Stew. & Port. 458; 6 Johns. Ch. R. 417; 2 Pirtle, 98; 6 Cow. 316; 1 J. J. Marsh. 258, 259; 1 Wash. R. 184; Munf. Index, 325.

3. The court erred in giving the charges asked by plaintiff. *Clayborn* v. *Hill*, 1 Wash. Va. R. 184; *James* v. *Johnson*, 6 Johns. Ch. R. 417.

Evans and *Topp*, for defendant in error.

1. The doctrine of merger does not apply to a case of this kind; it applies only when the legal and the equitable estates meet in the same person, and that even in those cases there is no merger, if there be any beneficial purpose to be served by keeping the legal and equitable titles separate and distinct. *Starr* v. *Ellis*, 6 Johns. Ch. R. 396. "It is very clear, that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he choose, at once take the estate and keep up the charge." Ib. "The question is upon the intention, actual or presumed, of the person in whom the interests are united." Ib. See, also, *Gardner* v. *Astor*, 3 Johns. Ch. R. 54.

2. No merger could take place here, as the legal estate was in Wade, the trustee, and not in Bartee, until he purchased from Wade in 1842.

3. By the deed made by Turner on the 11th May, 1839, if anything passed to Bartee, it was only such an equitable interest as remained in Turner, after executing the deed in trust to Wade. This equitable interest would be merged in the legal estate, which commenced with the execution of the deed in trust, and, consequently, effectually excluded the lien of the judgment under which Brown bought.

4. If the deed of trust had been assailed for fraud, or for want of consideration by proof, which made a *prima facie* case against it, then it would have been incumbent on Bartee, by proof of the consideration to sustain its integrity. The deed

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in trust, itself, was all the proof which Bartee wanted of the consideration, as its fairness was not questioned by the proof of the defendant below.

Were it necessary to prove the consideration expressed in a deed in trust, before the deed is assailed by proof, it would be impossible to deraign a title through a deed in trust after the lapse of years.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action of ejectment, for two lots in the town of Columbus, in which the lessor of the plaintiff obtained a verdict. Exceptions were taken, during the trial, to the rulings of the court, on which the case is brought up by writ of error.

The first ground taken in this court, arises on an exception taken to the decision of the court, in refusing to rule out a deed of trust, made by Turner to Wade, for the benefit of Bartee. The history of the case is simply this; on the 21st of February, 1839, Turner made a deed of trust to Wade, by which he conveyed the lots in question to secure a debt of $1500 due to Bartee. On the 9th of April, 1839, a judgment was rendered against Turner. The defendant derived title under this judgment, by virtue of a sale made by the sheriff in 1842. In May, 1839, Turner, the grantor in the deed of trust, made an absolute conveyance by bargain and sale of the trust property to Bartee, and, in 1842, the property was sold by the trustee; Bartee became the purchaser, and took a deed. It is thus seen that the deed of trust was the first incumbrance, and the judgment the next.

The application was made to rule out the deed of trust, because the plaintiff did not introduce proof to establish the consideration on which the deed was given, and it is contended that such proof is necessary in a controversy between the claimant under a deed of trust, and a purchaser at sheriff's sale. In support of this position, we are referred to several cases decided by the supreme court of Alabama. These cases have been examined, and are found to sustain this doctrine. We are always inclined to pay great deference to the decisions of sister

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states, but in this instance we are constrained to differ with the supreme court of Alabama. The first time the question came before that court, was in the case of *McCain* v. *Wood*, 4 Ala. R. 258, when the question does not seem to have been much considered, except that *under the particular circumstances* of the case, such proof was held to be necessary, because, said the court, the deed was executed after the indebtedness, and even after the judgment. The court seems, afterwards, to have built upon that case, until the question became settled, without ever having examined the solidity of the foundation on which the superstructure was reared. It results from these cases, that a deed of trust is *prima facie* fraudulent; or, in other words, that the party introducing such a deed must prove that it was not fraudulent. On general principles, a deed is *prima facie* valid, and its recitals true, and it requires no evidence to support it, until it is attacked for fraud. In *Hundley* v. *Buckner*, 6 S. & M. 70, this court said: "Another objection is, that there is no evidence of the *bona fides* of the debt secured by the deed of trust, nor any evidence of its existence, except the recital in the deed of trust, and the production of the note for which it was given. This was sufficient *prima facie* proof, and none other was requisite unless this had been impeached." That is the point made in this case, and we adhere to the rule as then stated. Fraud is never presumed, and never to be negatived until it is charged or made to appear. The judgment did not exist when this deed was made, although it is probable the debt did. But a debtor has a right to sell and convey his property — he may prefer creditors. This is the general rule. The exception to it is, that he cannot convey to defraud creditors. He who wishes to bring a deed within the exception, must make his proof. The presumption of law is always against bad faith. These Alabama cases reverse the rule, and establish this new doctrine, that it is fraud in law for a man to convey property who owes a debt. The rule which would require the purchaser to prove the fairness of the transaction amounts to this.

Exceptions were also taken to the refusal of the court to give certain charges asked for the defendant, and to the giving of those asked for the plaintiff.

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The first charge refused was, that a *cestui que trust* may take an absolute *bona fide* conveyance of the trust estate, and the latter (the trust estate, we suppose, was intended,) becomes merged in the former, unless the contrary is declared at the time to be the intention of the parties. This construction was asked, no doubt, in view of the subsequent absolute conveyance made by Turner to Bartee, which was younger than the judgment. If this conveyance could be regarded as the only title Bartee had, the property was of course liable to the judgment. This charge could not have been given without a total disregard of the distinction between a legal and equitable title. After the deed of trust was executed, what interest had Turner in the lots? certainly nothing but an equity. Then how could he make an absolute conveyance of the legal estate, when he had no such estate to convey? His conveyance, at most, only passed such right as he had. He could not convey that which he had not. It does not follow, that a party by adopting a form of conveyance appropriate to pass the legal estate, thereby conveys such estate. Whatever form he may adopt, he can only transfer such interest as he possesses. If he has but an equity, that is all that he can convey. The legal title to these lots was in Wade the trustee, and it could not be divested without his concurrence, or the judgment of a competent tribunal. Bartee held the entire equity by the purchase or conveyance, and, after that, Wade held the legal title as trustee for Bartee alone. He was previously trustee for both parties. The doctrine of merger then can have no application.

But it is contended that the conveyance by Turner to Bartee was a rescission of the conveyance in trust, as it was made by the only parties interested. It is certainly true, that Bartee was thereby invested with the entire equity; but we do not perceive, in view of well-defined distinctions, how two persons, each holding but an equity, could rescind a contract which passed the legal estate to a third person, without the concurrence of that third person. A party who holds the legal title cannot be divested of it, except by his own act, or in virtue of the decree or judgment of a court of competent jurisdiction. The case of

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Standifer v. *Chisholm*, 1 Stew. & Port., is cited in support of this position. That was a controversy about personal property. If there should be a distinction between real and personal property, that case may rest upon it. If there is not, then we know not how to reconcile it with what we conceive to be well-established principles. It must be incontrovertibly true, that parties who hold nothing more than equities, can dispose of nothing more. If we could regard the beneficial interest as the legal title, our conclusion might be different.

The second charge asked and refused was, that if the jury should believe from the evidence, that the trust deed to Wade as trustee, was paid or extinguished by the execution of the absolute deed from Turner to Bartee, they must find for the defendant.

Payment is usually a question of fact, but extinguishment is a question of law. Here both were questions of law. We have already endeavored to show, that the right conveyed by the deed of trust was not extinguished by the absolute deed. The debt might have been paid, but the deed of trust was not susceptible of payment. It was but a security for the payment of the debt. The absolute conveyance could only operate to extinguish Turner's interest. The legal title was still in Wade. The court was asked by this charge to submit to the jury the effect of the absolute conveyance, which would have been improper. The jury could not determine whether the deed of trust was paid or extinguished by the absolute deed. It was for the court to determine as to the legal effect of the conveyance.

When Wade sold under the deed of trust and Bartee became the purchaser, he was for the first time invested with the legal title, which had its origin in the deed of trust, and he held it precisely as Turner did when the deed of trust was made; and if the doctrine of merger can have any application, it is by sinking Bartee's equity into his legal title; which, however, would not so operate as to act in intermediate judgments. It could not do so in this instance, as the legal title passed out of Turner previous to the judgment, and never returned to him. If the judgment could have been binding on anything, it was his

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equity which the judgment creditor might, whilst it existed, have appropriated by the use of proper means.

These remarks cover substantially the charges which were given at the instance of the plaintiff, and they do not require further notice.

Judgment affirmed.

William Wright *vs.* Mildred Beck.

The statute of this state (H. & H. 395, § 35,) provides for the grant of letters of administration by the probate court of the county where the intestate had his residence, or if he had none, of the county where he died, "or of that (county) wherein his or her estate, or the greater part shall be;" *held*, by the latter clause of the act was alone intended that county in which the estate might be at the time of the decease of the intestate, and not the county where the estate might be at the time of the grant of letters of administration.

B. alleged, in her petition in the probate court of Yalabusha county, that J. B. died in the state of Arkansas, that part of his property since his death had been improperly removed into that county in this state, and W. had taken out letters of administration thereon, and sold part of it; that she was the widow of J. B., and prayed that the letters of administration might be revoked, the administrator's sales set aside, and she herself appointed administratrix; the probate court decreed according to the prayer of the petition. *Held*, that the grant of letters to W. was *coram non judice*, and properly set aside and revoked, but the probate court had no jurisdiction to set aside the sales made by W., and so far its decree was erroneous.

On appeal from the probate court of Yalabusha county; Hon. Thomas Carbry, judge.

Mildred Beck, in October, 1845, filed her petition in the probate court of Yalabusha county, to have revoked and annulled the grant of letters of administration in April, 1845, to William Wright, upon the estate of Jeffrey Beck, whose widow she was, to have certain sales made by Wright, as administrator, set aside, and letters granted to herself.

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She states that these letters to Wright were procured by fraudulent means, at a time when she believed the property of her husband was in Arkansas, where he died; that Wright and John Beck, by secret means and a fraudulent combination, removed the property to Yalabusha county, in this state; and Wright, expressing to her his profound ignorance as to the whereabouts of the property, came to Yalabusha and took out letters of administration upon it, in order to deprive her of her lawful right to administer.

That Wright made an inventory of the property to the court, and in a fraudulent manner effected a sale of it; and a portion if not all was bought for the use of Wright and under his direction, though nominally the sale was made to John Beck. She prays that the letters may be revoked, the sale set aside, and letters granted to her.

Wright and John Beck are made defendants.

The defendant Wright answered the petition at length, alleging a fraudulent combination between William Beck and John Beck and the complainant, to run the property of Jeffrey Beck first to Texas, and afterwards to North Carolina; and that he as a creditor of the estate of Jeffrey Beck, pursued it and brought it back, &c.

It is not deemed requisite to set out the pleadings or proof further.

The probate court decreed as follows:

"Upon opening the matters in this case, and the parties appearing both in person and by counsel, and a patient and particular investigation being made in all the matters set forth in the petition of the plaintiff, and the court being fully satisfied that most of the allegations set forth in said petition are true:

"It is therefore considered and ordered by the court, that the letters of administration granted by this court to the said William Wright, on the estate of Jeffrey Beck, deceased, on the 7th day of April, 1845, be revoked, and that all power and authority and trusts thereby conferred, now cease and determine, and the sale of the property by said administrator, made on the 7th day of June, 1845, be set aside and for naught held."

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A. H. Davidson, for appellant.

1. The act of the legislature, H. & H. 395, gives jurisdiction to that county "where the greater part of his estate shall be;" it is plain that no reference is made to the act of the intestate in locating the property in the particular county; the court has jurisdiction where the property *shall be;* here it was in this state, in Yalabusha county, consequently the probate court of that county had jurisdiction.

2. John Beck never answered the petition, nor was served with process, nor brought before the court; so there was in reality but one party, and a summons and severance not necessary.

3. The appellee forfeited her right to administer by failing to apply in sixty days after the death of her husband, and the court had the right to appoint a creditor or other fit person, (H. & H. 395,) and having done so, the judgment and appointment were conclusive until reversed. 2 S. & M. 339; 6 Pick. 426; H. & H. 385; 5 How. (Mi.) 739; 1 Ibid. 453; 1 Pet. 328.

4. At a subsequent term, the probate court had no jurisdiction over it. 1 S. & M. 321, 510; 2 Ibid. 287, 304, 339; 5 How. (Mi.) 736.

5. The probate court had no power to revoke the letters. In H. & H. 395, §§ 36, 44–48, are detailed the instances in which probate courts may revoke letters. *Expressio unius, exclusio est alterius.* The case made in the bill is not in the bill.

6. It had no power to set the sales aside. H. & H. 395, §§ 36–48; 3 Bac. Ab. tit. *Exec.*; 3 T. & M. 125; 15 Serg. & R. 42; 1 Wms. Ex. 340; 3 S. & M. 304.

Fisher, for appellee.

1. But one defendant joined in the appeal.

2. The probate court had no jurisdiction; the property was not placed in the county by the deceased; nor was it there when he died.

3. The widow was prevented by fraud from asserting her rights to administer within the sixty days. This should not affect her right.

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Mayes, *Clifton* and *Mayes*, on same side.

1. The probate court had no jurisdiction; the letters granted were void, and therefore their revocation cannot be erroneous. H. & H. 395, § 35; 1 A. K. Marsh. 300; 4 Litt. 277.

2. No grant of letters in this state would be valid under the circumstances; the grant in Arkansas conferred the legal title on the property then in that state on the administrator there; this was not removed or destroyed by the removal of the slaves to this state; the administratrix in Arkansas can pursue here any remedy she pleases to recover the property, without taking out new letters. It would be otherwise if the property had never been in Arkansas.

Mr. Justice THACHER delivered the opinion of the court.

The probate court of Yalabusha county, granted letters of administration to William Wright, upon the estate of Jeffrey Beck, deceased. At a term, subsequent to this grant of letters, Mildred Beck, widow of said Jeffrey, filed her petition in the same court, charging, that said Jeffrey died in the state of Arkansas, intestate, and that a portion of his property was improperly removed, after his death, into this state, and the county of Yalabusha, and praying for a revocation of said letters of administration, for the setting aside of sales of certain property made by Wright, as administrator, aforesaid, and for a grant of letters to said petitioner. The court below decreed, revoking the letters of Wright, and setting aside the sales made by him, in his capacity of administrator.

The statute H. & H. 395, sec. 35, provides that the granting of letters of administration, of the estate of any intestate, and the hearing and determining the right of the same, shall pertain to the orphans' court of the county in which the intestate had, at the time of his or her death, a mansion-house, or known place of residence; and, if he or she shall have no such known place of residence, then to the orphans' court of the county where the intestate shall die, or of that wherein his or her estate, or the greater part thereof, shall be.

The question to be resolved, is, whether the statute is to be

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construed to relate to the county where the estate may be, at the decease of the intestate, or to the county where it may be at the time of granting the letters of administration.

A fair construction of the language of the statute, leads to the determination that the county is alone intended in which the estate may be at the time of the decease of the intestate. In New York, the statute, besides authorizing a grant of letters of administration, under the same circumstances as they are allowed in this state, provides further, that they shall be granted where an intestate, not an inhabitant of that state, dies out of that state, not leaving assets therein, but assets shall thereafter come into the county of a surrogate. Kirtland's Surrogates, 61. The question now before us was determined, as has been above intimated, in the case of *Embry* v. *Millar*, 1 A. K. Marshall, 300.

The grant of letters of administration to Wright, by the probate court of Yalabusha county, was *coram non judice*, and, therefore it was competent for that court, upon being apprized of that fact, to direct them to be revoked, vacated, or recalled. But that court proceeded a step further, and directed sales, which had been made by Wright, as administrator aforesaid, to be set aside. This was assuming a jurisdiction which, under the circumstances, did not appertain to that court.

The decree of the probate court must, therefore, be reversed, and a decree entered in this court, directing the letters of administration granted to William Wright, upon the estate of Jeffrey Beck, to be revoked.

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JOHN J. HUMPHRIES *vs.* NEILL BARTEE.

A judgment obtained by fraud and collusion, between one not a party to the record and the defendant, predicated upon a forged note of the defendant to the apparent plaintiff, who is a real person, but does not participate in the fraud, is fraudulent, and a nullity and all proceedings under it are of the same character.

T., being indebted to B. for borrowed money, conveyed certain slaves, by absolute bill of sale, to B., to secure the debt; these slaves were afterwards sold at public auction, by agreement between T. and B., and bought by B.; afterwards by collusion between H. and T., a judgment for a large sum was obtained in favor of one R., who was a non-resident, against T., in a different county from that of T.'s residence, upon a forged note of T.'s, for a debt not owing, and the suit brought without the knowledge of R.; H. pretending to be the assignee of this judgment, levied an execution on the slaves in the hands of B., who gave bond to try the right of property. On the trial, T., being admitted as a witness, testified, that the sale of the slaves to B., was fraudulent, upon which the jury found the slaves subject to the execution against T.; and they were sold under it, and bought by H; B., afterwards finding that the judgment under which H. claimed, was fraudulent, and that the whole proceeding had been conducted by fraud and collusion between H. and T., filed his bill to vacate the sale of the slaves to H.; *held*, these facts being made apparent, that the original judgment was void, and the proceedings under it void, and no title passed to H. by the sale under it.

The rule that holds a party to strict vigilance, when he resorts to equity for relief against a judgment at law, the defence to which was purely legal, is fully complied with in a case where the party seeking relief against a sale of property claimed by him, shows that the sale was made under a judgment to which he was not a party, which judgment, he alleges, was obtained by fraud, of which fact he had no knowledge at the time his property was held subject to an execution on it; the plaintiff in which judgment, was a non-resident, who had lately changed his residence, and had no interest in, or knowledge of, the fraudulent judgment rendered in his name, and the party seeking the relief had no knowledge of these facts, until he filed his bill.

Where one is about to be affected by a judgment to which he is not a party,

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his proper remedy for avoiding it is in chancery; he may there show, that the judgment was recovered by fraud.

No relief can be had against a void contract, when a judgment has been rendered thereon at law, where the defence ought to have been made; you cannot go behind the judgment; it is otherwise however, if *the judgment itself* be void for fraud in its rendition.

Nor can a judgment, void for fraud, on which an execution has been issued and levied, and the property levied on, claimed by a third party, and, on a trial of the right, declared subject thereto, be made valid by the failure of the claimant at the time he set up the void character of the judgment; the rule which holds the party to vigilance in making his defence at law, does not apply to such a case; for want of vigilance on his part, could not make the void judgment valid.

Where slaves were conveyed by an absolute bill of sale to the vendee, but in reality, merely as a mortgage, to secure a debt due by the vendor, and judgments are subsequently rendered against the vendor, and the vendee seeks relief in equity against executions on these judgments, the proper remedy is, to decree a sale of the slaves, and order the proceeds to be appropriated first to the satisfaction of the mortgage-money, the amount of which is to be ascertained by an account; and, second, to the payment of the judgments, in the order of their priority, excluding such judgments as are not recorded in the proper county, according to the statute; if he desire it, the vendee may redeem from judgment creditors of the vendor.

An absolute bill of sale, designed however between the parties as a mortgage, if delivery of the thing sold accompany the bill of sale, need not be recorded to be valid as against subsequent judgment creditors of the vendor. A court of equity, in treating it as a mortgage, will protect the rights of the vendee; the possession by the vendee, was equivalent to notice by registration, even if it had been competent to record an absolute bill of sale.

APPEAL from the vice-chancery court at Columbus; Hon. Henry Dickinson, vice-chancellor.

Neill Bartee alleges in his bill, in substance, that on the 21st of February, 1839, he loaned Samuel W. Turner $1500, to pay off certain judgments against him with, and took his note, bearing ten per cent. interest for loaned money, secured by a deed of trust to Pascal B. Wade, on two houses in Columbus. On the 7th of May, 1840, Turner conveyed the slaves Ben, Nancy, Kitty, Esther, and Peggy, to Bartee, by an absolute bill of sale, but intended to secure payment of the same and other money. The consideration expressed was $2700; as soon as this was

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paid by Turner the bill of sale was to be void, though absolute on its face. The slaves were delivered by Turner to Bartee.

At the time this bill of sale was made, Turner was indebted to R. S. Blount, in the sum of $266, secured by a deed of trust on the slave Kitty, executed in August, 1838; at the request of Turner, Bartee paid this debt, and took an assignment of it and the deed of trust. Besides this sum Bartee paid at different times, before the bill of sale was made, about $811 for Turner; he files his bill of items.

The bill further proceeds to detail the history of the two houses conveyed by the deed of trust, and gives an account of their rents, &c., which is not material to the merits of the main controversy. These lots were sold in March, 1842, by the trustee, and bought by Bartee, for $100, but were afterwards resold by the sheriff, under an execution in favor of Owen against Turner, for $62, rendered 9th April, 1839.

At this time, by an agreement between Turner and Bartee, the slaves were also sold at public auction, except Nancy, who had died. They were sold at the court-house for a full price, and brought $1500; they were all bought by Bartee; but no credit was made then, or subsequently, on Turner's indebtedness to Bartee, nor could he then, or at any time, procure a settlement with Turner, who had then formed the design to defraud Bartee.

Turner put into Bartee's hands certain notes for collection, out of which he had made some small sums stated, for which he was chargeable.

In the summer of 1842 these slaves, except Ann, were levied on under an execution purporting to be on a judgment rendered on the 6th of March, 1841, in favor of David Reinhardt against Turner, for the sum of $5383.06, rendered in Lowndes county. Bartee claimed the slaves, gave bond, and an issue to try the right of property was made up to the October term, 1842, of the circuit court. On the trial Turner was allowed to testify. He stated that he was not interested in the event of the suit; that the arrangement between Bartee and himself was entered into for the purpose of defrauding Turner's creditors; and upon his evidence the jury found the slaves subject to the execution.

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A suit was also brought against Bartee for the lots, and upon Turner's evidence he lost that suit also. But the bill seeks no redress for the lots.

That Turner early conceived the design to defraud Bartee out of his money and securities; and to that end sought confederates. He found an ingenious, capable and ready one in Humphries; they held frequent conferences at Humphries's and finally devised and executed this scheme to accomplish their end. Turner made his writing obligatory, by which he promised to pay one David Reinhardt $2300, on the 1st of January, 1825, dated on the 21st of March, 1824. This writing he gave to Humphries to collect, as an attorney at law. Humphries afterwards pretended that he had bought it on the judgment afterwards rendered on it, from his client, and paid for it in land. Suit was brought to October term, 1841, in Lowndes county, though Turner lived in Octibbeha county; judgment by default was rendered, execution issued, and the trial of the right of property had as stated. That Turner could not identify Reinhardt as his creditor, nor show his residence, or the dealings which led to his indebtedness, and formed the consideration of the bond; nor could Humphries tell who left with him the bond, identify his client, show how he bought the bond, to whom he gave the land, nor what land. That Turner, in a quarter where he had not expected exposure, had boasted of his success in this scheme of frauds; had said he had part of the property fixed, meaning the lots, would soon have the other part, meaning the slaves; and after a while he would get the property or its proceeds turned over to his boys.

After the verdict on the trial of the right of property, an execution issued on the Reinhardt judgment, and the slaves were taken into custody by the sheriff, when the following executions were issued, and levied on the slaves, to wit: one in favor of Wright and others against Turner, for $169.32, rendered December 13, 1839; one in favor of James Owens against Turner, for $62, of the 9th April, 1839; one in favor of Alexander Gray against Turner, for $1444, rendered on the 28th of May, 1839; and one in favor of Charles M. Rogers, for $193.63, of Decem-

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ber 31, 1839; all these executions but those of Gray, which was the property of Bartee, were issued by the procurement of Humphries, to enable him to carry out his scheme of fraud. That before the slaves were sold under these executions, Humphries had an alias execution on the Reinhardt judgment issued, and, on the day of sale, in order to deter bidders, proclaimed that, as soon as the sale was over, he would seize and sell the slaves again under that judgment, to which they had been declared liable; in consequence of which the slaves only brought $735, about half their value, and were bought by Humphries. That, emboldened by his success, Humphries had directed a writ of garnishment on this judgment against Bartee, as a debtor of Turner; and on Bartee's answer that he owed nothing, had taken an issue, which was yet pending. The slaves were yet in Humphries's possession, nor had he paid anything, having agreed with the sheriff to pay the money to such executions as the circuit court of Lowndes should direct, and no direction had yet been made.

The bill attacks the validity of the various executions under which the sale of the slaves took place, states that Humphries, "before he embarked in the Reinhardt speculation," knew of the loan of money by Bartee, and the nature of his title, and insists that if any of the executions under which the sale took place are valid, Bartee should be allowed to redeem them. The prayer was for injunction and general relief.

Turner denied in his answer that the object of his bill of sale to Bartee, and also of the subsequent public sale, was to secure the debt he owed him; but says, it was made to put his property out of the reach of his creditors and to defraud them, especially those who had claims against him as a member of an unincorporated banking company. He denies his indebtedness to Bartee, to the extent set up in the bill; denies the fraudulent combination with Humphries, and says, "that the graphic statements in the bill about the fictitious hero, Reinhardt, is all a humbug, and without the shadow of a foundation;" and adds, "see how a plain tale of truth will put this scare-crow to flight." He proceeds to detail the mode in which he became

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indebted to Reinhardt for goods purchased of him, while Reinhardt lived in Alabama. It is not deemed necessary to set out at greater length this part of the answer. He admits, that the body and signature of the note are in his hand-writing; that he has no interest in Humphries's proceedings or the judgment of Reinhardt. He admits the statements attributed to him by the bill, but says they were made for Bartee's ear, "to punish him for his base treachery," and were merely expressions of his rejoicing at the writhings and mournings of the miser defeated."

At this late time he could not remember any other particulars connected with the Reinhardt note; he did not defend the suit, because he had no motive, being irretrievably ruined, and Bartee having all his property.

Humphries's answer admits the loan by Bartee to Turner of the fifteen hundred dollars, and of the bill of sale, but insists that one of the objects of the latter was to defraud Turner's creditors. He dwelt at length on the fraudulent nature of the dealings between Bartee and Turner, both as to the matters mentioned in the bill and other matters; and also denies at length the correctness of Bartee's claims against Turner, and sets out his own views as to what was due.

He admits the delivery of the slaves to Bartee, but insists that it was merely a cover to avoid impending suits against Turner, and that the consideration expressed in the bill of sale was for a far greater amount than was due to Bartee, and was so inserted fraudulently. He states and insists that the public sale was also a mere sham sale; Bartee paid nothing, credited nothing, and only intended to further defraud Turner's creditors; that the sale was void for not being by order of court.

The rendition of the judgment in favor of Reinhardt, the execution, the trial of right of property, the testimony of Turner, and the verdict are admitted, and it insists that this verdict estops Bartee from further inquiry as to the ownership in the slaves. It is claimed to be conclusive.

He denies the charges of collusion and confederacy with Turner, and all fraud as to the Reinhardt judgment; says he be-

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lieves the note on which it is founded genuine, and executed when it purports to have been; it was sent to him by mail for collection, as an attorney at law, by one who styled himself, in his letter, Jeremiah C. Billingsley, and so far as known to him, Billingsley claimed to be the owner, and he receipted to him for it as such; the letter enclosing it was dated at Memphis, Tenn. early in 1841, and it informed him, as Turner was under the weather, the writer would have an agent in Columbus to do the best he could with it; that he has been informed that Billingsley lived in North Carolina. In due time a man by the name of Runnels, who held his receipt, and reported himself as the agent of Billingsley, came to Columbus, and finding out Turner's situation, traded the claim to respondent for the aggregate amount of two thousand acres of unimproved land in Neshoba county, for which he executed and delivered a deed in the name of Billingsley. He sued on the note in Lowndes because the property and witnesses were there. He beliéves the consideration of the note valid between Reinhardt and Turner; knows nothing of Reinhardt's present residence; he once lived in Lincoln county, North Carolina.

Humphries also proceeds to answer, at length, the allegations of the bill touching the sale of the slaves to which he became the purchaser; gives the history of each execution; insists the sale was by agreement with Bartee, who claimed to own one of the judgments under which the sale was made, and who was present at the sale and bid on the property, and is thereby concluded from attacking the sale as fraudulent.

Reinhardt's answer was subsequently filed. He says, he is an entire stranger to the matters and things set forth in complainant's bill, between complainant, Humphries and Turner, and can say nothing in relation thereto; he knows nothing of the judgment in his favor; Turner never owed him the money; and never gave him any such obligation as that stated in the bill on which the judgment is founded. He lived in Lincoln, North Carolina, in 1822, 1823, 1824 and 1825; was a merchant.

His deposition, subsequently taken, stated that he moved to Florida in 1842; for fifty years previously, had lived in Lincoln

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county, N. C.; he knew Turner in North Carolina, had some small dealings with him, he was a journeyman saddler; on cross examination, he says his brother-in-law took some saddles to Alabama, does not know that Turner obtained them.

Bartee filed an amended bill, stating that he did not know of the fraudulent character of the Reinhardt judgment until after the trial of the right of property, nor did he know of Reinhardt's residence until his bill was filed.

Hezekiah W. Goode testified, that about the month of August, 1840, at the house of Turner, in Octibbeha county, he heard Turner say, that he let Bartee have a lot of negroes for the purpose of securing a loan of fifteen hundred dollars; but he intended to arrest the property out of Bartee's hands by law, and did not intend to pay a single dollar of it; that he had a plan with others, to law the property out of Bartee; that he would not be known in the transaction, but would be the only witness, and when the property was recovered, would share half of it; since 1840, he had heard Turner say, he had gained a part of the property agreeably to his plan, and at next court would gain the rest. He did not know Bartee.

Various depositions were taken to establish similar declarations by Turner, and the indebtedness to Bartee, and the other matters set up on either side in the pleadings; but it is not deemed requisite to set them out.

Vardy McBee, whose deposition was taken in North Carolina, proved, that he was the brother-in-law of Reinhardt, knew Turner in North Carolina, well; he had worked for him in his saddlery store; it was impossible for Turner to have traded with Reinhardt for so large a sum; the witness gives the history of Turner's life and dealings in North Carolina at length, and shews that from his condition in life, means, occupation and the witness's personal knowledge of Turner's character and situation, he could not have dealt with Reinhardt, or been trusted by him for any such sum.

Charles R. Crusoe testified, that he was the attorney who obtained the judgment on the Reinhardt note; it was placed in his hands by Humphries, who represented himself as the agent

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or attorney of Reinhardt; he had no cause to suspect Reinhardt not to be the owner until after the judgment, when Humphries wanted to give the sheriff an indemnifying bond to levy the execution, when Humphries told him, that he and some others had an interest in it.

Turner's deposition was also taken; among much other matter he testified, that he knew nothing about the consideration of the Reinhardt note; his impression was, he never executed it.

Several witnesses testified, that from the general character of Turner for veracity, they would not believe him upon his oath.

Depositions were also taken with reference to the sale by the sheriff; the agreement with Humphries and the sheriff as to the payment of the money.

The cause was referred to a commission of the court, to report the amounts due on the different judgments against Turner; and due by Humphries for the hire of the negroes since 1843. The report was made accordingly; and found that Humphries was indebted in the sum of $520.

The vice-chancellor, on final hearing, confirmed the report, and ordered that Bartee pay to the sheriff of Lowndes county, the sum found due by the commissioner on the different judgments, which was $576.56; and that thereupon, the sheriff deliver to Bartee the slaves in controversy; it was further decreed, that Bartee recover of Humphries, the sum of $520, and have execution therefor; and recover of Turner and Humphries his costs.

Humphries prayed an appeal; and subsequently, Bartee a cross appeal; upon which the cause was argued in this court.

R. Evans, for Bartee,

Reviewed the facts and points involved in an argument of thirty pages in length. He contended, 1. That the answer of Humphries was in itself incredible in the account he gives of his connection with the matter, and clearly established his guilty collusion with Turner.

2. That the proof of fraud on the part of Turner and Humphries, developed by all the facts, and especially by Turner's

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false swearing and general conduct in the course of the plot, was perfectly overwhelming, and left nothing for the court to do but to make restitution to Bartee.

3. That the whole record refuted the charge set up in Humphries's answer of the fraud between Bartee and Turner; it rested alone on the statement of Turner; and it was plain that Bartee was to be the victim of Humphries's and Turner's fraud; but if Bartee *had* defrauded Turner, it would be no answer in Humphries's mouth to the fraud he had committed on Bartee; however Bartee may have defrauded Turner, it could be no shield to Humphries's fraud on Bartee.

4. The various executions levied on the slaves at the instance of Humphries, to shield his pretended right, derived under the fraudulent trial of the right of property, can none of them avail to disturb Bartee's right to the slaves. On this point, Mr. Evans examined each execution separately, and insisted that they were, under the facts of each, ineffectual to bar Bartee's rights.

5. That Bartee really made a *bona fide* loan of the fifteen hundred dollars to Turner, and in all their subsequent dealings had acted with integrity and probity. The dealings between Bartee and Turner were scrutinized at great length.

6. That the bill of sale from Turner to Bartee, though absolute on its face, yet intended merely as a mortgage, was not therefore void. It was no evidence, or presumption even of fraud, and it could be shown by parol that it was a mortgage. *Whittick* v. *Kane*, 1 Paige, 202; *Slee* v. *Manhattan Company*, Ibid. 77; 3 Dana, 176, 252; 2 Cow. 330.

7. The insertion of the consideration of $2700 in the bill of sale was no evidence of fraud. The actual consideration may always be proved. 2 Phil. Ev. (Cow. & Hill's ed.) 217; 3 Ib. 1441, *n.* 964; 4 N. H. 229; 1 J. J. Marsh. 388.

8. Even if the subsequent deed to Bartee were fraudulent, it would not make the bill of sale fraudulent; yet there was no proof Bartee accepted that subsequent deed, and without that it was no deed. *Jackson, ex dem. Eames* v. *Phipps*, 12 John. R. 418; *McCrea* v. *Dunlap*, 1 John. Cases, 116; *Maynard* v.

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Maynard, 10 Mass. 456; 3 Phil. Ev. (Cow. & Hill.) 1283–1285, n. 888.

9. There was no proof that the subsequent deed was fraudulent; or if so, that any one but Turner shared in the fraud.

10. The charge in the answer of Humphries, that Bartee swore falsely when he made oath to the ownership in these slaves, is unsupported; for though he had title but as mortgagee, he was still the legal owner. 2 Sto. Eq. 297, § 1031; 2 Kent Com. 582; 4 Ibid. 139; *Brown* v. *Bennett*, 8 John. 96; 1 Pick. 389; *Ferguson* v. *Lee*, 9 Wend. 258; *Astor* v. *Hoyt*, 5 Ibid. 617; *Hart* v. *Ten Eyck*, 2 John. Ch. 100.

11. The decree of the vice-chancellor was erroneous as to Bartee, in making him pay off the *bona fide* judgment executions, which had been levied on the slaves. Bartee's lien was older than that of the judgments.

12. Bartee ought not to pay the costs; to exempt fraud from the costs and punish the innocent, is an error which should be corrected.

Baine, on same side.

1. All parties admit the validity of Bartee's loan of the fifteen hundred dollars; no one even hints at fraud in it but Turner; and the case shows that he was guilty of perjury in so doing.

2. Bartee's mortgage of May 11, 1839, by absolute bill of sale, is no evidence of fraud; the mortgage could be shown by parol. *James* v. *Johnson*, 6 John. Ch. R. 417.

3. The proof shows that there were at least $2754 due Bartee by Turner, nearly double the original loan after allowing all credits.

4. The whole record establishes the fraudulent combination to defraud Bartee; the Reinhardt judgment is a nullity; the trial of the right of property under it void, and in no way affects Bartee's rights.

5. Bartee's advances went to pay judgments against Turner; even if Bartee contemplated a fraud, he will be protected to the extent of the legal right conferred by the judgments he paid off;

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for if a fraud was contemplated, it was *absque injuria*. 5 How. Mi. 687; 1 Sto. Eq. 212; Freem. Ch. R. 343.

6. Even if Bartee designed defrauding, and did defraud Turner's creditors, it could not be relieved against unless it militated against an existing right. Humphries had no right whatever; he claimed under fraudulent and void proceedings throughout.

7. It is plain from the proof that Bartee committed no fraud.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The object of the bill in this case was to vacate a sale of certain slaves mentioned in the bill, of which respondent, who is appellant in this court, was the purchaser at a sale made by the sheriff.

The record is very long, but a very brief summary of the important facts will show the grounds on which the decision must rest.

On the 21st of February, 1839, Bartee loaned to one S. M. Turner the sum of $1500, and took a deed of trust on two town lots as a security. On the 11th of May following, Turner also conveyed to Bartee the slaves in controversy, and received, as it is alleged, other sums of money, and Bartee also agreed to pay a debt which was secured by a prior deed of trust. The bill of sale of the slaves was absolute on its face, though it is admitted to have been intended as a mortgage. This conveyance was accompanied by possession, and was intended as a further security for the original loan. Turner failed to pay, and by his consent the slaves were sold at public sale, and Bartee became the purchaser.

On the 6th of October, 1841, a judgment was rendered against Turner in favor of one David Reinhardt, for upwards of $5000, on a writing obligatory dated as far back as the 21st of March, 1824, payable the 1st of January, 1825. This suit was brought in Lowndes county, although Turner resided in Octibbeha county, and the judgment was taken by default. An execution issued on this judgment, which was levied on the slaves in the hands of Bartee, who claimed them as his property.

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An issue was made up to try the right, when Turner was introduced as a witness, and on stating that he was disinterested, was permitted to testify. He stated that the bill of sale to Bartee was made to defraud creditors, and the jury found in favor of the plaintiff in execution. The property was delivered up and sold under the Reinhardt judgment, though prior to the sale other executions had been placed in the hands of the sheriff. Humphries purchased the slaves at about half their value. He claims to be the assignee of the Reinhardt judgment. The note on which it is founded, was sent to him by mail for collection by one Billingsley, and he afterwards purchased the judgment from an individual, who professed to be an agent of the person who had sent the note for collection. This judgment constitutes the groundwork of this whole proceeding. The bill alleges that it was recovered by fraud and collusion between Turner and Humphries, on a note forged for the purpose, with a view of taking the slaves from complainant. Reinhardt is made a party to the bill, and his testimony was also taken. He positively disclaims ownership of such a note, or knowledge of the transaction, and says Turner never owed him that amount of money. He it seems resided in Lincoln county, North Carolina, at the date of the note, and had resided there many years, both before and afterwards, but now lives in Florida. He had known Turner when he was a young man, and had, as a merchant, some dealings with him, but never to the extent of the note. In addition to this testimony, Turner's declarations as to his purpose, were also in proof. The scheme was no doubt concocted for the purpose mentioned in the bill. This judgment is beyond all doubt fraudulent, and it is enough to say of it that it is a nullity, and all the proceedings under it are of the same character. No execution predicated on it could operate to pass a title to Humphries, who claims to be the owner of the judgment, and is, to say the least, chargeable with notice of the fraudulent character of the transaction.

In the answer of Humphries, the judgment on the trial of the right of property is relied on as a bar to the relief sought. We

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have said the original judgment was void for fraud. The subsequent proceeding was equally so. When a court of equity is resorted to for the purpose of letting the party into a defence which is, in its character, triable at law, he will be held to strict vigilance. By an amended bill it is alleged that complainant had not obtained information as to the nature of the Reinhardt judgment, until after the trial at law. In July, 1843, he received the first information as to Reinhardt's residence, and his informant assured him that he was satisfied, from his acquaintance with both Reinhardt and Turner, that the latter could not have owed to the former any such debt. He then opened a correspondence with Reinhardt, and did not become fully informed on the subject until after he had filed the original bill. The circumstances of this case are peculiar. A note was forged bearing date nearly twenty years before the judgment was rendered on it. It was payable to a stranger, who was a citizen of another state, whose residence was likely to be unknown. But even if it should be found out where he had lived, he had changed his residence to a distant state. The great wonder is that the scheme was discovered at all. Under the circumstances, it would be difficult to say, what was or what was not proper vigilance.

But this case differs from those in which the rule of vigilance is usually applied. The complainant is affected by a judgment to which he was not a party. His proper remedy for avoiding it was in chancery. It is a subject over which chancery has original jurisdiction. The complainant might have proceeded by bill for that purpose, before the trial of the right of property. A stranger to a judgment may always show that it was recovered by fraud. 1 Starkie's Ev. 241; 1 Phillips's Ev. 341; 3 Ib. (C. & H.) 854. Has a court of chancery lost its power to interpose? Surely not, when the *judgment* is void. No relief can be had against a void contract, when the defence ought to have been made at law; but if the judgment itself be void, it is a different question. Hence, on gaming contracts, chancery will give relief, because the judgment is void, although the defence might have been made at law. If the contract be

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void, and the party fails to make his defence at law, the judgment is valid, and chancery will not interfere with it. But this judgment was void by the common law, and also by statute. It derives no validity from the failure to make the defence on the trial of the right of property. The original judgment was relied on as binding the property, but it was void, and may be set aside by a court of chancery. 1 Story's Eq. 275, § 252. It is true that Bartee might have pleaded, on the trial, of the right of property, that the judgment was fraudulent. But his failure to do so, does not make it valid. His want of vigilance has not imparted validity to the judgment, and the rule therefore does not apply.

But there are other judgment-creditors, whose rights are not to be overlooked. The bill of sale was made 11th of May, 1839. It was to operate as a mortgage. There is no doubt about the loan of $1500; that is admitted by all. The judgment in favor of Owens was rendered 9th of April, 1839, and is therefore a lien on all the negroes except Kitty, she having been previously conveyed in trust to secure a debt due to Blount. The other judgments were rendered after the bill of sale, and could bind nothing but Turner's right to redeem.

The case must be remanded for an account, and the rights of the parties will be regulated and allowed, according to the following directions. Bartee alleges that he paid a debt to Blount, who held a deed of trust on the woman Kitty, and took a transfer. If this be so, it constitutes a prior lien on the property included in that deed of trust, inasmuch as it bears date in August, 1838. By this arrangement Bartee was substituted to the rights of Blount.

2. Bartee is entitled to be allowed the $1500, and the other sums which he may prove to have been paid as a consideration for the conveyance of the negroes. Humphries is also to account for hire for the time he has had the negroes in possession, and Bartee is of course to be charged with what he has received.

3. Any surplus that may remain is to be appropriated to the judgment-creditors, in their order of priority, excluding, how-

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ever, such judgments as were not recorded in the proper county according to the statute. Or Bartee may redeem from these creditors.

4. In order to adjust these rights the negroes will be sold.

The vice-chancellor decreed the judgments to be a lien on the property, on the ground that the bill of sale, which was to operate as a mortgage, had not been recorded. In *Dey* v. *Dunham*, 2 Johns. Ch. R. 182, a deed absolute on its face, was converted into a mortgage by a subsequent defeasance in writing, and it was held that the subsequent agreement should have been registered as a mortgage, and that the registry of the absolute deed was not sufficient, because, as it was said, a subsequent purchaser was not bound to search the record of deeds to be protected against the operation of a mortgage. But here there was nothing to record. It is an equitable mortgage, an absolute instrument which equity converts into a mortgage, and equity will not so convert it to the prejudice of the grantee. The general rule is, that the instrument which gives rise to an equitable mortgage must be registered, if it be not an actual conveyance, but merely an instrument which raises an equitable mortgage. 2 Powell on Mort. 621, note. A bill of sale need not be recorded, and any parol agreement in relation to it cannot be. In the case cited from 2 Johnson, the possession probably remained with the grantor. Bartee took possession of the negroes, and no other conveyance was necessary to pass title. This was equivalent to notice.

Decree reversed, and cause remanded.

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SAMUEL DORSEY ET AL. *vs.* JAMES H. MAURY.

The several states of this Union are each sovereign and independent, and their relations are those *of foreign states in close friendship*, in regard to all matters not surrendered to the general government; and but for the act of congress, the judgments of each state would be regarded as foreign judgments in every other.

The judgments of the courts of the United States, must be construed to be embraced in the act of congress, as to the authentication of judgments, or they must be esteemed as foreign judgments; in either case, the judgment must be properly authenticated.

In a suit, therefore, in this state, the certificate of a discharge in bankruptcy, by the clerk of the district court of the United States for the eastern district of Louisiana, under the seal of the court, is inadmissible in evidence, without the authentication of the clerk's certificate by the judge.

A new trial will not be granted, because the party was ignorant of the legal effect of a record which he relied on as evidence; the fact, therefore, that he was ignorant that the records of judgments of the courts of the United States, must be authenticated, according to the act of congress, and, therefore, went to trial, relying on a record of one of those courts not so authenticated, will be no ground to entitle him to a new trial.

IN error from the circuit court of Claiborne county; Hon. Stanhope Posey, judge.

James H. Maury sued Samuel Dorsey and Edward H. Dorsey, in the circuit court, on a note; the latter defendant plead, that he had been discharged as a bankrupt, under the act of congress; issue being taken on the plea on the trial, the defendant offered in evidence, the certificate of his discharge by the district court of the eastern district of Louisiana, given under the seal of the court by the clerk, but not otherwise authenticated. The court below excluded the certificate, and the jury found for the plaintiff.

The defendants moved for a new trial, and filed an affidavit, stating, that, being sued on the note from which he had been

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discharged by his bankruptcy, he employed no counsel to defend it, but filed his own plea of bankruptcy, and had his certificate ready in court at the trial, and never knew that it was necessary that it should have the judge's authentication, which he could procure by the next term of the court.

The motion being overruled, he prosecuted this writ of error.

L. N. Baldwin, for plaintiff in error.

1. The act of congress relates to state court judgments and records, not United States court records; the latter are evidence all over the Union.

2. A new trial should have been granted. The affidavit shows that manifest injustice has been done.

James H. Maury, in proper person.

1. If the record of a judgment is offered in evidence, in a court of another state from that in which it was rendered, it must be a record of the entire case; and a record of detached portions of the proceedings, such as a certificate of discharge in bankruptcy, will not be admitted. This is a general rule, and supported by many reasons that are obvious. Norris's Peake, 63; Buller's N. P. 228; Gilb. 24.

2. There is no case to be found, in which it is decided, that the record of a judgment of a foreign country, or of a sister state, or of a court of the United States, sitting in a sister state, is sufficiently authenticated by the bare certificate of the clerk. His official character is not recognized by the courts of other states. The clerk must be certified to be such, by the judge of the court of which he is the clerk, or by some functionary of recognized authority. 2 Hawks, N. C. R. 44; Peters, C. C. R. 353; 1 Hay. 359; 2 Wend. 411; 3 John. Ch. 125; 17 John. 272; 1 Wend. 131.

3. In the state of Louisiana, it is decided, that the records of judicial proceedings in the courts of the United States, sitting in another state, are not sufficiently authenticated by the certificate of the clerk; and that his official character must be also established by some authority, to make it admissible evidence in the courts of that state. 11 Rob. L. R. 429.

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Mr. Justice CLAYTON delivered the opinion of the court.

The only legal question in this case, is, whether a certificate of a discharge in bankruptcy, by the clerk of the district court of the United States for the eastern district of Louisiana, under the seal of the court, was admissible in evidence, without an authentication of the clerk's certificate by the judge.

The judgment of a court of the United States is not in terms embraced in the act of congress, regulating the mode of authentication of judgments of the several state courts. H. & H. 791. The several states are each sovereign and independent, and their relations are those of *foreign states in close friendship*, in regard to all matters not surrendered to the general government. 1 Greenl. Ev. 565. But for the act of congress, the judgments of each state would be regarded as foreign judgments in every other.

The judgments of the courts of the United States, must be construed to be embraced in this act, or must be esteemed as foreign judgments, when offered as evidence in the court of a state, other than that in which they were rendered. In either case, an authentication of the clerk's certificate is necessary. 1 Greenl. Ev. 585. The only ground upon which any other construction could rest, is the assumed consolidation of all the states, in reference to the judicial system of the general government. This was not contemplated by the constitution.

The court did not err in rejecting this certificate. The affidavit for a new trial shows no sort of diligence to guard against the alleged surprise. Every one is chargeable with a knowledge of the law; the ignorance of the plaintiff in error, is the only ground on which the new trial is claimed. To recognize the validity of such claim, would introduce an unwarranted indulgence.

Judgment affirmed.

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ELI FERGUSON *vs.* SETH APPLENHITE.

Where a trustee is seeking, by bill in equity, possession merely of the trust-property, it is not necessary for him to bring before the court the other parties interested in the trust, but who had nothing to do with the question of possession.

A. alleged in his bill that J. executed a deed of gift of certain slaves to A. as trustee for the children of A.'s two daughters, M. and N.; the slaves to be held by A. for the benefit of M. and N., until their youngest children arrived at age, and then the slaves were to be equally divided among all the children. M. married F., who took the slaves into possession; M. died leaving four minor children; N. was living, with minor children; F. refused to deliver the slaves to A; and the bill was filed to recover them. F. was the only party defendant to the bill, and he demurred for want of parties; the court below overruled the demurrer, and the high court affirmed the judgment.

A decree having been rendered in the court below upon a *pro confesso* taken on the overruling the demurrer, directing the defendant to deliver up the slaves to the complainant, the defendant, on appeal to the high court, sought to have a decision as to his claim in right of his wife, and also his claim to a proportion of the profits of the slaves until the period of division; it was *held*, that those points not having been raised by answer or cross-bill in the court below, could not be adjudicated by the high court; but that the defendant was not precluded from asserting otherwise any rights he might have to the profits of the slaves.

ON appeal from the decree of the vice-chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Seth Applenhite stated in his bill that, on the 16th of June, 1831, John Applenhite executed a deed of gift, by which, in consideration of his love and affection for his daughters, Mary, wife of Eli Ferguson, and Martha, wife of Asa Lee, he gave their children the slaves Hester and her child Mike and their future increase; his daughters to have the benefit arising from

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the said negroes until their youngest children arrived of age, then to be equally divided among the children of his daughters, the property to be in the care and management of complainant who was the donor's son, until the object of the deed should be accomplished. The deed was exhibited with the bill.

John Applenhite delivered the slaves to complainant, and the latter delivered them to the daughters who were married at the time; by an agreement with the sisters, Mary took the slaves into possession, and kept them until February, 1845, when she died, leaving four infant children; Martha Lee was living, with minor children. The slave, Hester, had five or six children.

That Eli Ferguson had these slaves in his possession ever since the death of his wife, and would remove them from the state unless prevented. The bill prayed for injunction; that Ferguson might be compelled to give security to have the slaves forthcoming, and that possession might be decreed to complainant.

Ferguson demurred to the bill, because the children of the two sisters were not made parties. At the December term, 1846, the court overruled the demurrer; and, at the June term, 1847, the bill was taken for confessed, and the court decreed that Ferguson should deliver the slaves to complainant, and, in default thereof, on his being served with a copy of the decree, the sheriff should seize and deliver them to Applenhite.

Ferguson appealed from this decree.

Sheppard, for appellant.

1. The deed gives a joint estate in the negroes to the children of Martha Lee and Mary Ferguson, not to be divided until the youngest is of full age, and until that time it is given to the trustee for the benefit of Martha Lee and Mary Ferguson. These persons should have been made parties. The bill in this respect is defective, and the objection for this cause should have been allowed. Story's Eq. Pl. 236, § 207.

2. The marital rights of the defendant are not excluded by the language of the deed. The expression "for the benefit of my daughters," is not sufficient to create a separate estate. See 2 Story's Eq.; *Grand Gulf Bank* v. *Barnes et al.* 2 S. & M. 185.

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3. The bill shows, that there was a division of the negroes between the daughters, Martha Lee and Mary Ferguson, by which the latter obtained the slave Hester and her increase.

It is apparent, then, that the court erred in the final decree, in directing the defendant to give up this property. Not giving any directions to secure to the defendant the profits of the estate, or allowing him to give security, and retain the possession.

Whitmore, for appellee.

1. The only object of the bill, was, to enable the complainant to discharge his trust duties, by regaining the possession of the slaves in controversy, which the defendant had threatened to remove, and which, by the deed of John Applenhite, had been committed to his care, for certain specific purposes. It was not necessary that the beneficiaries should have been made parties.

2. If Ferguson, by virtue of the deed of gift, was entitled to any interest in the negroes in controversy, in right of his wife, it determined with her death. At best, neither he nor his wife had any right whatever to the negroes, and his wife was vested only with an interest in the proceeds of their hire or labor, subject to the control of the complainant; — when she died, the marital rights of her husband, if he had any, ceased also, and a retention by him of the negroes, after this event, was illegal.

Mr. Justice THACHER delivered the opinion of the court.

Seth Applenhite filed his bill in the district chancery court, in which he alleged, that John Applenhite executed a deed of gift to the children of his two daughters, Mary, married to Eli Ferguson, the defendant in the bill, and Martha, married to Asa Lee; that the gift consisted of a slave (Hester) and her son, with her future increase, to be for the benefit of his daughters, until their youngest children arrived at age, and then to be equally divided among all the children; that the deed confided the slaves to the care and management of the complainant, the son of the donor; that the complainant, at the time of the execution of the deed, placed the slaves in the care of said Mary and Martha, and, by an agreement between them, Mary

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took possession of the slave Hester; that Mary is since deceased, leaving four minor children, and Martha still living, with minor children; and that the defendant, Ferguson, has now possession of the slave Hester, with a numerous increase, whom he refuses to surrender to the complainant. The prayer of the bill is for the recovery of the possession of the slaves from Eli Ferguson.

The defendant filed a demurrer to the bill, stating, for cause, that the children of Mary and Martha were not made parties; which demurrer the vice-chancellor disallowed.

The bill was filed, to recover the possession of the slaves. The deed of gift gives to complainant, as trustee, the right of possession. It was not necessary to bring before the court, the children, who, although interested under the trust, were not concerned in the question of the possession. They were not interested in the subject-matter and object of this particular suit. Sto. Eq. Pl. 89, sec. 766.

As to the questions raised in regard to the rights of the defendant, as husband of Mary, through his wife derived, and his claim to a proportion of the profits of the slave, until the maturity of the time of division, it is sufficient to answer, that, in the present aspect of this suit, its limited scope, and without those points having been raised, they were not there in issue, and could not be adjudicated. The bill, as before remarked, was for a particular object; there was no answer or cross-bill, but a judgment *pro confesso*. Nothing in this decree precludes the vindication of any rights that may appertain to the defendant, in regard to the profits of the slaves.

Decree affirmed.

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Dabney M. Wharton *vs.* David M. Porter et al.

To an action on a supersedeas bond, the defendants plead performance; the plaintiff replied and assigned, "that the defendant did not prosecute his said supersedeas with effect, nor has he well and truly paid, &c.," but did not aver that a supersedeas had issued: *Held*, that the replication was defective for want of such averment; the defendant had a right to put in issue the existence or issuance of the supersedeas.

The statute of 1840 (p. 133 of Sheet Acts) is imperative, that it shall be the duty of the judge, and *he is thereby required* to allow amendments to be made, if desired; and if the circuit court, on the application of a plaintiff to amend his replication, which has been held bad on demurrer, refuse to permit the amendment to be made, the high court of errors and appeals will reverse the judgment that the amendment may be allowed.

In error from the circuit court of Madison county; Hon. John H. Rollins, judge.

Dabney M. Wharton, for the use of A. J. Davis, administrator of Martha Davis, sued David M. Porter, Dennis Burns and Wesley Drane, on a supersedeas bond, given by Porter as principal and the others as sureties, in an action of debt in the usual form.

A judgment, by default, was rendered against Burns. Porter pleaded his bankruptcy, and a verdict and judgment were given for him. Drane pleaded, in substance,

1. Conditions performed.

2. That the bond was signed and sealed by him, subject to be received, approved, and accepted by the clerk, in conformity to the order and fiat of the judge requiring it; that it never was so received, and so was not his deed.

3. A plea to the same effect with the second.

4. That the bond was signed, sealed and delivered by defend-

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ants, in consideration that a supersedeas should issue, staying proceedings, &c.; that the consideration had failed, for a supersedeas never did issue, so that proceedings never have been stayed, &c.

5. That the bond never was accepted and approved according to law.

To the first plea, the plaintiff's replication denied performance, and assigned for breach, that Porter did not prosecute his supersedeas with effect, nor has he paid the judgment superseded. To the second and third pleas, that the bond was received, approved and accepted according to the true intent and meaning of petition, and in conformity to the fiat of the judge, and so is the act and deed of the defendants. To the fourth plea, that a supersedeas did issue, &c. And to the fifth plea, that the bond was accepted and approved according to law. The first replication concluded with a verification. The others with a verification by the record.

A demurrer was filed to the replication to the first plea, because it does not show that a supersedeas ever issued, or had any legal effect; or that the plaintiff was hindered in having execution of his judgment, whereby any damage resulted to him; and because it does not show that proceedings on the supersedeas have been determined. To the replication to the second and third pleas, a demurrer was filed, because it concludes with a verification, when it ought to conclude to the country; because it is no answer to the pleas, neither confessing and avoiding, nor denying the facts; and because the evidence offered to prove the execution and validity of the bond, might be admitted, and still the writing not be binding on the defendant. The demurrers to all the replications were sustained by the court below. The plaintiff asked leave to reply over, and to amend his replication; this was refused by the court, and he excepted. A judgment for defendant was then rendered on the demurrer, and the plaintiff sued out this writ of error.

L. Lea, for plaintiff in error.

A. H. Handy, for defendant in error.

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Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action on a supersedeas bond, against Porter and his sureties, but one of whom is now party to the proceedings. The defendant Drane pleaded five special pleas, to which the plaintiff replied. The defendant demurred to the replications to the first, second and third, and after the demurrer was sustained, withdrew the fourth and fifth pleas. The plaintiff asked leave to amend his replications, but this the court refused, and rendered judgment against him.

Two questions have been discussed; first, as to the correctness of the decision on the demurrer, and, second, on the refusal of the court to allow the plaintiff to amend.

The first plea was performance. The plaintiff replied and assigned, that the defendant "did not prosecute his said supersedeas with effect, nor has he well and truly paid, &c." This breach is defective in one particular; it does not aver that a supersedeas issued. If it did not, the defendant could not prosecute it. The breach of a bond must state all that is necessary to give the plaintiff a cause of action, with particularity as to how the breach occurred, for, otherwise, no sufficient certain issue would be attained. The defendants had a right to put in issue the existence or issuance of the supersedeas.

The decision on the demurrer to the second and third replications, is not seriously controverted. But it is said, in the second place, that the court erred, in refusing permission to amend, and the statute of 1840 is relied on. Apart from this statute, the decisions of this court are against the position here assumed. We have uniformly held, that amendments are within the discretion of the court, and the refusal to allow them, is not ground of error. The case of the *Vicksburg Water Works Bank* v. *Washington*, 1 S. & M. 536, so decides, in a case very much like the present.

The first section of the statute, requires the pleadings to be made up, and issues of law disposed of at the return term; but the fifth section provides, that, if it shall be discovered at the trial term, that the pleadings are defective, or issues tendered are immaterial, it shall be the duty of the court, and the judge

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is thereby *required*, to cause the same to be amended or perfected instanter, so that the merits of the controversy shall be fairly put to the jury. Acts of 1840, 133. This statute very clearly provides for the case before us. The pleadings were defective, and the merits could not be reached without amendment. It is no longer discretionary with the court, to allow or disallow amendments. The act is imperative, that it shall be the duty of the judge, and he is thereby required, to allow the amendment to be made if deserved. Such is the construction which was placed on it, in the case of *Kain* v. *May*, 5 S. & M. 368, and also at the present time.

This statute necessarily changes the rule which had been established by this court, in accordance with the principles of the common law. And it is proper to observe, that the case of the *Water Works Bank* v. *Washington*, although the decision was made since the passage of the statute, was decided on pleas put in before the statute, and the attention of the court was not called to the statute by counsel.

The court should have permitted the plaintiff to amend, and, for this error, the judgment must be reversed, and the cause remanded.

JAMES M. TURNER *vs.* JOHN R. CHAMBERS, Guardian *ad litem* of the infant heirs of Thomas W. Burge.

The remedy to enforce the right of creditors to pursue the estate of the testator in the hands of legatees, after the executor or administrator has assented to the legacies, is in equity to compel them to refund.

T. administrator *de bonis non*, *c. t. a.*, of B., deceased, who had paid certain debts of the testator out of his individual funds, filed his petition in the probate court to subject certain slaves specifically bequeathed, to the payment of the sum advanced by him, they being the only assets left; by his petition he showed that he was guardian of the specific legatees, and that the slaves bequeathed were in his possession as guardian; that as guardian he employed their services for the maintenance of the legatees, and that a

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former guardian of the legatees, had inventoried in the probate court the slaves as the property of the legatees; *held*, that the slaves having thus, if not by order of court, with the administrator's assent, passed into the guardian's hands, would not have been subject even to a *fieri facias* against the goods of the testator; and the probate court properly dismissed the petition.

On appeal from the probate court of Lawrence county; Hon. Mathew B. Cannon, probate judge.

James M. Turner alleges in his petition, that as administrator *de bonis non* of Thomas W. Burge, deceased, he had paid out of his own private funds in payment of debts against the estate, the sum of five thousand seven hundred and thirty-five dollars, as appeared by his accounts to the probate court.

That he was appointed by the probate court successor to A. S. Eldridge, as guardian of the minor heirs of said Thomas W. Burge, deceased, and that he still held that office over all but Beverly B. Burge. That Eldridge, as guardian, returned into the probate court as the property of said minor heirs, certain slaves, which, by the will of Burge, were specifically bequeathed to them, as by the will would appear. This return was made by Eldridge without any reference to the outstanding claim of petitioner.

When he succeeded Eldridge as guardian, being willing to suspend the collection of his claim for a time on account of the necessitous condition of the children, who were then in extreme want and very young, he continued to report to the court his guardianship accounts of the proceeds and hire of the negroes, and to appropriate them to the use and support of the minors, as though entirely unaffected by his claim.

That these slaves had never been delivered to the guardian of the minors by any order of the court; nor had the administrator of Burge any authority to deliver them over, as his estate was yet altogether unsettled.

That part of these slaves were in the possession of Beverly B. Burge's guardian, and petitioner was apprehensive they would be removed. That there were no other assets or property of the estate unadministered, and he had no recourse for the payment of his debt but to these slaves.

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He prayed, therefore, that the slaves might be transferred from his account as guardian to his account as administrator, and might be appraised and sold to pay his debt.

The probate court appointed John R. Chambers guardian *ad litem* of the infants, who were made defendants to the petition.

It is not necessary to set out the answer of the guardian *ad litem*. The probate court dismissed the petition, and the petitioner appealed.

J. F. Foute and *Robert Golladay*, for appellant.

1. The probate court had jurisdiction of the petition; Turner was administrator, and the petition related to the matters of administration; the object of the petition being to have certain slaves appraised as the *property of the estate*, which had been theretofore erroneously in his hands as guardian.

2. There was no assent to the vesting of the legacies in the minors; Turner says the administrator had no authority so to act; he had the slaves still *in his possession*, and manifestly looked to them as his indemnity for the money paid by him. It was a mere act of humanity that induced Turner to give the wards the benefit of the hire and labor of the slaves, and he ought not to be punished for his liberality.

3. Were such assent given under our law, a probate court has power to rebate legacies to satisfy claims against the estate, on application by a creditor. 2 How. (Mi.) 624, 813, 861; 3 Ibid. 258; *Green* v. *Green*, 3 S. & M. 270; 10 Pet. 567; Com. Dig. tit. *Administrator*, C. 1; 2 Leigh's Rep. 70; 2 Pick. 517; *Harper* v. *Archer*, 8 S. & M. 229.

Vannerson, for appellee.

1. The case presented is not one of intestacy or of a character testamentary; it has no connection with either, as it presents nothing in the course of administration, but is a distinct and individual claim in the right of petitioner against the legatees, who have received and are in possession of the property. Consequently the probate court had no jurisdiction of it.

2. The filing, stating and settlement of an account by an ad-

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ministrator or guardian in the probate court, showing a balance in favor of such administrator or guardian, is not evidence to charge the heir or ward. 1 How. (Mi.) R. 53, 63.

3. The capacity of administrator and guardian, although in the same person, is separate, distinct and independent of each other, and he cannot be pursued in the same suit in the double capacity of administrator and guardian; neither can he so act. 1 How. (Mi.) R. 365.

4. The capacity of administrator and guardian being separate, he, as administrator, is a stranger to the doings of the guardian, and a mere stranger cannot move in the probate court for the revocation of letters of guardianship. *Cotton* v. *Goodson*, 1 How. (Mi.) R. 295.

5. There is nothing in the law authorizing the guardian to create debts or make expenditures at his discretion. 1 How. (Mi.) R. 53.

6. The court of probate has no power to release the complainant from his liability as guardian, otherwise than on a final settlement of his accounts as such; nor has the court any power to deliver over the property which the complainant shows by his bill or petition, that he has been managing as guardian, and making his annual reports of such his actings, and place the same into the hands of the administrator of Thomas W. Burge, to be subject to debts, especially when it is shown that the legacies have vested in the legatees of which complainant is guardian.

7. Although the will of Thomas W. Burge may have directed the payment of his just debts before distribution and payment of the legacies, yet the supposed debt created by the complainant in favor of himself, whilst acting as administrator *de bonis non* against said estate, is not a debt within the meaning of the law governing the construction of the will, because the said supposed debt was not a subsisting one at the testator's death. *Green* v. *Green*, 3 S. & M. 256, 270.

8. The legatees had a right to the property bequeathed on the payment of the debts, owing by the testator at the time of his death without the assent of the executor, and could have maintained an action at law for it. 2 S. & M. 530.

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9. The record does not show that the complainant returned an inventory, or that this was done by his predecessor; and the court will presume that this was not done; and the law is that an omission by an executor or administrator to make and exhibit an inventory, is evidence of assets sufficient to pay the legacies, and every legatee may recover his whole legacy at his hands. 5 Am. Com. Law, 313, and authorities cited.

10. An administrator cannot voluntarily pay debts of the estate, although just and regularly probated and allowed, out of his own private funds, and thus at his own will constitute the estate his debtor; but if the money on hand of the estate is insufficient for that purpose, he must stop paying. If there be property belonging to the estate under such circumstances, he must make the proper representation to the probate court, and obtain an order to sell the personal, and if necessary, the real estate.

11. An administrator is not bound or liable for the payment of debts beyond the amount of assets in his hands as such; and if he does pay more than the assets amount to, he pays it at his own risk; nor does such payment constitute in him any claim, or give him any lien upon the legacies or distributive shares, that may have been paid off or distributed, not even in case there were refunding bonds given to him.

12. The payment of debts irregularly, voluntarily, and against the requisitions of the statute, by an administrator, gives him no right in law to seek a reimbursement from the effects of the estate.

13. An administrator cannot contract with another by which he can make the estate liable for such contract; but in all such cases, the contract so made is construed to be his own contract, and he alone in his natural capacity is liable.

14. The remedy of complainant here, if any, is in equity.

Mr. Justice THACHER delivered the opinion of the court.

Turner petitioned the probate court of Lawrence county, and set forth the following allegation. As administrator *de bonis non* of Burge, deceased, he paid certain debts, from his indi-

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vidual funds, which were due from the estate. Thereupon, he claims that certain slaves, *specifically* bequeathed to the minor heirs of Burge, should be subjected to the liquidation of his claim against the estate, there being no other assets to respond the same. But it is shown by his petition, that Turner is also guardian of the minor heirs, save one, and that in that capacity he has employed the proceeds of the labor of the slaves for their maintenance and benefit. Turner, as guardian of the heirs, became so as successor of Eldridge, and the petition shows that Eldridge, as guardian, returned into the probate court the slaves as the property of those heirs. This shows that the slaves had passed into the possession of the guardian, if not by an order of court, certainly with the assent of the administrator. Under such circumstances, the slaves would not have been liable even to be levied under a *fieri facias* against the goods of a testator in the hands of the executor or administrator, notwithstanding that the executor, being guardian of the legatee, continues as guardian to hold them, hiring them out. Lomax on Ex'rs and Adm'rs. 2, 134; 5 Mumf. 103; 3 Ibid. 99, 559; 1 Wash. 312. The remedy to enforce the right of creditors to pursue the estate in the hands of legatees, after the executor or administrator has assented to the legacies, is in equity to compel them to refund. Lomax, 2, 174.

The probate court of Lawrence county dismissed the petition in that court, which judgment is affirmed.

PETER FISHER, Administrator of GEORGE FISHER *vs.* WILLIAM W. LEACH.

The high court of errors and appeals will not disturb a verdict, although found contrary to a portion of the evidence, unless it is clearly against the evidence, or the palpable preponderance of evidence.

In an action of replevin for certain slaves, the evidence, in some particulars, was contradictory; but at least one witness stated, that the plaintiff's intestate delivered the slaves in controversy to the defendant, to be held by him

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until their services and labor had remunerated the defendant in the amount in which the plaintiff's intestate was indebted to him; on the testimony, the court below instructed the jury, that if they believed these facts, the defendant had the right to the slaves until the debt due to him was paid, and the jury found for the defendant; it was *held*, the high court of errors and appeals would not disturb the verdict.

Where an administrator brought an action of replevin, to recover slaves of his intestate, and the defendant set up that he held them under an agreement with the intestate, that he should do so until a debt the intestate owed him should be paid out of their labor and services, and the jury found for the defendant; it was *held*, that their verdict would not preclude the administrator from a proceeding in chancery, to ascertain what sum was due the defendant, and have the matter finally adjudicated.

In error from the circuit court of Yazoo county; Hon. Robert C. Terry, judge.

On the 13th of April, 1844, Fisher, administrator of George Fisher, sued out a writ of replevin for four slaves, against William W. Leach. At the November term, 1846, a trial was had, and the jury found for the defendant.

On the trial, the plaintiff read the answer of the defendant to a bill of discovery filed in the case; in which, in answer to the discovery sought, the defendant denies that he ever offered to hire the slaves from the plaintiff, or promised to deliver them to him on the day the plaintiff, as administrator, had advertised them for sale; but stated, that he had promised to deliver them on that day, provided, the plaintiff would settle with him, the debt due him by the intestate.

John S. Wallace testified, that in the year 1842, he hired part of the slaves in controversy of George Fisher in his lifetime, in consideration of witness's boarding Leach at his house; Leach being at that time, and for some time afterwards, the clerk of George Fisher, and had charge of the slaves; the witness kept the slaves for a month or so after George Fisher's death; that Leach, after Fisher's death, told witness Fisher owed him for services as clerk, and he did not intend to give up the negroes until he was paid; Leach had since gone to Texas.

James W. Barnett, for plaintiff, testified, that he had frequent

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conversations with Leach and Mary Ann Wallace, the wife of John S. Wallace; and in those conversations they admitted, that these slaves were the property of George Fisher, who was then living, but died in October, 1843; witness was a physician, and both Leach and Mrs. Wallace, the latter of whom had hired the slaves, told witness to charge his medical bill to George Fisher, to whom the slaves belonged. This was before Fisher's death. The slaves had been, since the suit was brought, carried from the country.

Andrew Murdock, for plaintiff, testified, that George Fisher was, in his lifetime, a merchant of good credit; that Leach was his clerk, and had some little property; that the slaves were worth $950; and Leach had removed them from the country and sold them.

The defendant then read the deposition of Mary Ann Wallace, who testified, that she hired the slaves of Leach in November, 1842; two or three weeks afterwards, Mr. George Fisher and Mr. Leach were at her house; and she heard a conversation between them, on the subject of Fisher's debt to Leach and the slaves; when Fisher told her that Mr. Leach had the possession of the negroes, and that she must look to him for them, and pay him the hire until he and Leach had a settlement, as he was indebted to Leach. She paid the hire to Leach ever after; that Fisher owed Leach for services as his clerk; that Mr. Leach always claimed the negroes as his; she had hired them of him all the time; and she heard George Fisher say, the negroes belonged to Leach until the debt due him was paid.

On this proof, the court, at the instance of the defendant, instructed the jury that, "if they believe from the evidence, that George Fisher, in his lifetime, was indebted to the defendant Leach, and delivered the negroes in the declaration mentioned, to him, Leach, as a pledge or security for the debt thus due, then, unless said debt has been paid either by George Fisher in his lifetime, or by some person for him, the law is for the defendant Leach, and they must so find."

The plaintiff excepted; moved afterwards for a new trial, and the motion being overruled, he sued out this writ of error.

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Battaille, for plaintiff in error.

W. R. Miles, for defendant in error.

1. The instruction asked for by the defendant, and granted by the court below, is clearly the law.

2. The verdict of the jury may have been found against the weight of evidence; but it is not against the testimony; for, under the instructions of the court, it is manifest that the finding of the jury was predicated upon the deposition of Mrs. Wallace.

Courts never interfere with verdicts, when there is sufficient legal testimony to sustain them.

Mr. Justice THACHER delivered the opinion of the court.

Fisher, administrator of Fisher, instituted his action of replevin against Leach. There was a trial by jury, with a verdict for Leach, the defendant.

The bills of exceptions set forth all the testimony adduced upon the trial. The evidence, in some particulars, was contradictory; but it was established by at least one witness, that the intestate Fisher, in his lifetime, delivered to Leach the slaves, for whose recovery the action was instituted, to be held by him until their services and labor had remunerated him in the amount in which he was indebted to Leach. Upon this particular, in case of any doubt, it was the province of the jury to determine, and the court will not disturb a verdict, although found contrary to a portion of the evidence, and only when it is clearly against the evidence, or the palpable preponderance of evidence. The consideration of the evidence upon this point, was brought to the view of the jury by the charge of the circuit court. The court instructed the jury, that if they believed from the evidence, that Fisher, in his lifetime, was indebted to Leach, and delivered the negroes in the declaration mentioned to Leach as a pledge or security for the debt thus due, then unless said debt has been paid either by the intestate in his lifetime, or by some person for him, then the law is for Leach, and they must so find.

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The decision in this suit at law, will not preclude the administrator from a proceeding in chancery, to ascertain and establish what sum is still due to Leach, and to procure a final adjudication of the matter.

Judgment affirmed.

JOHN D. MARTIN *vs.* CHARLES LOFLAND ET AL.

Where three executions have been levied on the same property of the defendant therein, and a third party has claimed a portion of the property thus levied on, and given a bond to try the right, and the plaintiffs in two of the executions tender issues to try the right which were joined in by the claimant, while the plaintiff in the third execution failing to tender an issue, the court rendered a judgment discharging the claimant from it, and dismissing the trial as to it, and on the issues tendered by the others, part of the property was held liable to the judgments; and executions issued against the claimant, who paid the money to the sheriff; *held*, that the plaintiff in the execution, which tendered no issue for the trial of the right of property, had no claim to any part of the money thus paid by the claimant.

The statute which declares, that if from the default of the plaintiff in execution an issue shall not be made up to try the right of property, the claimant shall be discharged from the bond given, and the property therein mentioned shall not thereafter be liable to satisfy the plaintiff's execution, is a complete discharge of the property from liability to the execution; and if it be afterwards sold on other executions, the plaintiff who has thus abandoned and forfeited his right to it cannot claim the proceeds.

Where the high court of errors and appeals have decided a controversy between two judgment-creditors, as to their respective rights to the proceeds of sales made on their executions, and a subsequent controversy between the same parties as to their respective rights to the proceeds of other sales made under like circumstances under executions on the same judgments, arises; the former decision will be conclusive of the rights of the parties in the latter controversy.

ON appeal from the circuit court of Lafayette county; Hon. Hugh R. Miller, judge.

There was a motion in the court below to appropriate money made on executions under the following facts: Charles Lofland obtained a judgment against Richard A. Corbin and his security,

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by means of the forfeiture of a forthcoming bond, on the 16th of October, 1843, which was enrolled on the 26th of June, 1844. John D. Martin obtained a judgment against the same defendant and security by forfeited bond on the 6th of May, 1844, which was enrolled May 13, 1844.

R. H. Byrne obtained a judgment against the same parties by forfeiture of a forthcoming bond on the 6th of May, 1844, which was enrolled June 21st, 1844; all in Lafayette county. Executions issued on each of these judgments, to the May term, 1845, of the court, and were levied on the same property, which was claimed by G. L. and E. F. Corbin, to whom it was surrendered by the sheriff upon their executing the usual bond. At the return term of these executions, Byrne and Lofland tendered issues to their claimants, to try the right of property so claimed at that term. Issues were duly made up between the claimants and Byrne and Lofland, respectively.

John D. Martin failed to tender an issue to the claimants at the return term of his execution, and at the April term, 1846, of the court, the claimants were discharged from their bonds; the cause dismissed, as to John D. Martin, and judgment rendered in the claimant's favor for costs by reason of the default of Martin in tendering and making up an issue with claimants, at the previous term of the court, to try the right of property. Pending the trial of the right of property, Lofland and Martin sued out other executions upon their judgments, which were levied on property of Corbin not included in the other levies, and a controversy arising as to which execution was entitled to the proceeds of the sales, the high court of errors and appeals adjudged them to Lofland. It is not deemed requisite to notice further this branch of the case.

In the mean time the issues between the claimants and Lofland and Byrne were tried, and the jury found in favor of the plaintiffs in execution as to a portion of the property levied on, and the court below gave judgment accordingly. Executions issued upon these judgments against the claimants, and the money in controversy was paid by them to the sheriff in discharge of these executions. The sheriff asked the direction of the court below

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as to the application of the money. The court applied it, first to the satisfaction of the judgment of Lofland, and the residue to that of Byrne, to the entire exclusion of Martin's judgment, from which judgment Martin appealed.

Lucas, *Watson*, and *Clapp*, for appellant.

This case does not fall within the meaning and operation of the act. H. & H. 654, § 77. It was the intention of the legislature, to protect the property referred to, as the property of the claimants, and not otherwise. Had Martin issued an execution on his judgment, after the judgment aforesaid had been rendered in favor of said claimants, and had the same levied on the slaves so claimed, and as to which the judgment set out, had been entered, it is very certain that the claimants alone could have interposed. Such judgment certainly could not have enured to the benefit of the debtor, or in any way have shielded his property from his judgment creditor. By the finding of the jury in the case of Byrne, it was ascertained, that the slaves in question were the property of the execution debtor, and, being his property, they were subject, when this fact was ascertained, to the elder lien. *Lucas* v. *Stewart and Mitchell*, 3 S. & M. 231. Session Acts, 1844, p. 99, sec. 9.

Tuliaferro and *Hayes*, for appellees.

1. The lien of Martin's judgment on the property levied on, was lost, by his default in tendering and making up an issue at the proper term of the court. The claimants were legally discharged from their bonds, the property levied on discharged from the execution, and not subject ever afterwards to the satisfaction of the judgment. H. & H. 654, sec. 77.

2. John D. Martin abandoned his levy, by refusing to make up an issue, and electing to sue out another execution upon his judgment, upon the claimants replevying the property. *Walker* v. *McDowell*, 4 S. & M. 118.

3. The money in controversy, was paid to the sheriff by the claimants, upon the executions then in his hands, of Lofland and Byrne, and not by the sale of the property claimed. Mar-

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tin had no judgment against claimants, and his execution was not instrumental in producing the money.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

All of the parties to this controversy, had obtained judgments against one Richard R. Corbin. Several sales of property were made, and the money arising from them, has been already appropriated, except a certain sum raised under the last executions, which is now the subject of controversy, each party claiming to have it appropriated in discharge of his execution.

Two of the parties, to wit, Martin and Lofland, have had a case before this court, which grew out of a contest about the appropriation of the proceeds of a previous sale, made under the same judgments. By that decision, Lofland's lien was held to be entitled to the proceeds of the sale, and it is decisive of the rights of these two parties in the present case. By holding that Lofland's lien should be preferred, as to the particular fund then the subject of dispute, we, in effect, decided, that his right to the proceeds of any subsequent sale, made under like circumstances, would also be preferred to Martin's. See 8 S. & M. 352.

The circuit court directed, that Lofland's execution should be first satisfied, and that the residue should be applied in satisfaction of Byrne's execution. The contest is, therefore, between Byrne and Martin. The record presents some confusion, as to the dates of the perfection of the forthcoming bonds, and it is, therefore, rather difficult to tell which was the prior lien. But the rights of the parties will be controlled by other circumstances.

All three of the executions were levied on the same property. A part of it was claimed by a third person, who gave bond to try the right according to the statute. Lofland and Byrne both tendered issues, but Martin failed to do so, and, as to him, the court rendered a judgment, discharging the claimants, and dismissing the case. On the issues tendered by the others, the jury found part of the property, to wit, three of the negroes, liable to the executions, and judgment was rendered against

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the claimants. Executions issued, and the defendants, who were the claimants, paid this money to the sheriff. Under these circumstances, we think that Martin had no right to it. It was paid by defendants, against whom he had no judgment. But the statute is explicit, in declaring, that, if from the default of the plaintiff in execution, an issue shall not be made up to try the right, the claimant shall be discharged from the bond given, and the property therein mentioned shall not thereafter be liable to satisfy the plaintiff's execution. Revised Code, 202, sec. 26. This statute is a complete discharge of the property from liability to the execution; and if it be afterwards sold on other executions, the plaintiff, who has thus abandoned and forfeited his right to it, cannot claim the proceeds. A voluntary payment by the claimant, places him on no better ground, as he has no lien on the thing which is the consideration for the payment.

Judgment affirmed.

Elizabeth Williams *vs.* Joseph A. Montgomery.

Under the act of 1840, ch. 74, regulating the practice of the circuit court, power is not conferred upon that court to order the plaintiff to be nonsuited, because he has not joined in an issue presented by the defendant at the first term; and if such a nonsuit be entered by order of the court, it will be error.

It seems, that under the act referred to, the circuit courts have power to direct a rule upon the parties, to make up the pleadings at the first term, so that they can be passed upon by the court; but not to nonsuit the party before having issued the rule.

In error from the circuit court of Amite county; Hon. Van Tromp Crawford, judge.

Elizabeth Williams, in March, 1844, sued Joseph A. Montgomery, at the May term of the circuit court of Amite county.

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The declaration contains several counts. The defendant filed a demurrer to the first count, with special grounds, and *non assumpsit* to the others. The plaintiff did not join in the demurrer. At the same term, the following order of nonsuit was entered in the cause; "And now, at this day, to wit, the 17th day of May, A. D. 1844, at a circuit court held at Liberty, in and for the county of Amite, on the second Monday in May, in the year of our Lord, 1844, before the judge of the state aforesaid, came the said defendant by his attorney aforesaid, and on his motion, the said Elizabeth Williams being solemnly called and demanded in open court, did not come to prosecute her said action, and it appearing to the court that the said plaintiff hath neglected to prosecute her said action against the said defendant, therefore, on motion of the said defendant by his attorney aforesaid, and according to the force and effect of the statute in such case made and provided, it is considered that the said Elizabeth Williams take nothing by her action aforesaid, but that she and her pledges to prosecute be in mercy, &c., and that the defendant go hence without day; and it is further ordered and adjudged of by the court, that the said defendant and the officers of our said circuit court do recover against the said plaintiff the sum of $11.75 for their fees, which have accrued in the prosecution of this suit, and that they have execution thereon;" from which judgment this writ of error is prosecuted.

Sanders and *Price*, for plaintiff in error.

1. The case of *Kain et al.* v. *May et al.* 5 S. & M. 368, is conclusive, that the plaintiff had the term to plead in, and the cause did not stand for hearing or any final disposition at that term.

2. The pleading, in fact, was complete. The court could decide the demurrer without a joinder, and the general issue required no joinder.

Smiley and *Lowry*, for defendant in error.

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Mr. Justice THACHER delivered the opinion of the court.

At the return term of a writ issued at the institution of an action of assumpsit, the defendant in the circuit court filed a demurrer to the first count of the declaration, and the general issue as to the other counts. There was no joinder filed to the demurrer, and, at the same term, the court directed a nonsuit to be entered up against the plaintiff for want of prosecution of the suit.

The act of 1840, ch. 74, regulating "the practice of the circuit courts," while it confers rights upon litigants, is directory upon the court as to its action at the return term. It directs, that all pleadings or defences which do not require the action of a jury to decide them, must be disposed of by the court at that term; and, for this purpose, it would be not improper in the court to issue a rule upon the parties to make up such pleadings, so that they could be passed upon by the court, but the act is not so imperative in that particular, as to warrant the court in ordering a nonsuit against a party failing to make up the pleadings in the first instance.

The judgment must be reversed, and the cause remanded for further proceedings.

REASON E. MABRY *vs.* OBADIAH MATHENY.

Bills and notes lose their negotiable character after payment, as between the original parties; but a party who indorses a note or bill after payment, knowingly, binds himself; and the indorsee may recover of him the amount of the note.

A declaration, which alleges that the defendant and two others, on a day named, made their note, and promised to pay D. or order a certain sum at a time named; and the defendant, after the date of the note, paid it to D. and took it into possession; and, knowing that he had in law discharged it,

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he, for value received, indorsed and delivered it on a day named, to the plaintiff, contains a sufficient statement of a cause of action against the defendant.

In error from the circuit court of Kemper county; Hon. Benjamin F. Caruthers, judge.

Reason E. Mabry sued Obadiah Matheny, in assumpsit, in three counts, but entered a *nolle prosequi* as to all but the last, and as to that the record recites "came on to be heard, the defendant's demurrer to the third count in plaintiff's declaration, which, upon argument, is sustained, and is considered by the court that the cause be dismissed. Therefore," &c. No demurrer is formally in the record.

This count substantially alleges, that the defendants, William S. Sharpe and B. V. Gamage, on the 11th of February, 1837, by their promissory note of that date, promise to pay James Douglass on or before the first of March next thereafter, six hundred and twenty dollars, with interest from the 27th of January last before its date. That on the 30th of May next after the date of the note, the defendant paid the same to Douglass, the payee, and took the note into his possession; that knowing he had in law discharged the note, for a valuable consideration received by him from the plaintiff, he indorsed and delivered the said note to the plaintiff on the 12th day of June, 1837, and by said indorsement promised the plaintiff to pay him the amount of the note with interest, according to the tenor and effect of the note, concluding with a *super se assumpsit*, and breach.

The plaintiff below sued out this writ of error.

A. B. Dawson, for plaintiff in error.

1. There can be no difference between a promissory note and a bill of exchange, as to the question presented by this count; and Mr. Justice Story, in his work on Bills of Exchange, section 223, says, "Bills remain negotiable even after payment, so far as respects the parties who shall knowingly negotiate the same afterwards; for in such case the negotiation cannot prejudice any other persons, and will only charge themselves." This authority, based upon the cases referred to in Story on Bills, p.

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246, note 2, must dispose of the first point in favor of the plaintiff in error, without the aid of the general rule, that every indorsement is equivalent to the making of a new note, where the indorsement is made after the note is due. See 17 Wend. 214; *Seymour* v. *Van Slyck*, 8 Wend. 403; 2 Am. Com. Law, 251, 252.

2. The plaintiff in error insists, that the count sets out a special contract by the defendant, in his indorsement to pay the note to the plaintiff; and the count being on this special contract founded on a valuable consideration, the plaintiff is entitled to recover in that view of the case. 7 Pick. 294.

Hutchinson and *Foote*, on the same side.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action of assumpsit on the defendant's indorsement on a promissory note. The plaintiff entered a *nolle prosequi* as to the two first counts, and relied on the third. It is recited in the record that the defendant's demurrer to the third count was sustained, and judgment rendered for defendant, and to reverse this judgment this writ of error is prosecuted, though in truth the record contains no such thing as a demurrer. But assuming that the demurrer was filed and sustained, the question is, was the judgment correct?

The third count charges the liability of the defendant to have arisen in this way; William S. Sharp, B. V. Gamage, and the defendant, had made a joint note to James Douglass. The defendant took up the note after its maturity, and indorsed it to plaintiff. The declaration alleges with all necessary precision, that by the indorsement, the defendant undertook and promised to pay the plaintiff the amount of money specified in the note. A contract is thus stated on which the plaintiff had undoubtedly a right to recover. As between indorser and indorsee, the indorsement is a new and distinct contract. If it be general, the note is referred to for the purpose of regulating or explaining the contract. But if it be special, as this declaration describes it to have been, the note is no further useful than to limit the

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amount of the contract. Bills and notes lose their negotiable character after payment, as respects the original parties. But a party who shall knowingly negotiate a note or bill after payment, binds himself. Story on Bills, 263, sec. 223. The demurrer to the declaration was therefore improperly sustained, and the judgment must be reversed and cause remanded.

WILLIAM ARTHUR *vs.* JOHN S. MITCHELL, use of Joseph D. Beers.

Whether an attorney at law, who receives a commission upon the sum he may collect in a pending suit is a competent witness for his client in that suit, or not; yet, if an attorney be offered as a witness for his client, the record must show *affirmatively* that he *is* to receive such commission, before the high court of errors and appeals can pass upon his competency.

Where an attorney, having in hands a note for collection, receives from the maker a certain sum, which, upon the trial of a suit upon the note, the maker seeks to have credited on the note, the attorney is a competent witness for his client in the case, because his interest is balanced, he being liable either to plaintiff or defendant, according to his testimony.

Where an attorney, who had received a note for collection and had sued upon it, was instructed by his client to withdraw the suit, upon the maker of the note paying his fees, and the maker did so, and the suit was dismissed, and the attorney, at the request of the maker, wrote a letter to the person to whom he had been directed by his client to send the note, in which letter he stated, that the maker of the note had paid the fees to be credited on the note; and, in a subsequent suit on the same note, the maker plead, as an offset, the sum paid the attorney for his fees, and produced the attorney's letter in proof of the offset; and the attorney thereupon testified, that the payment of the fees was the condition on which the first suit was to be dismissed, and was not to be a credit on the note, and that he had written the letter as he did at the instance of the maker of the note; and the jury found the full amount of the note; it was *held*, that the maker of the note was entitled to a new trial, on the ground of surprise at the testimony of the attorney; he had a right to rely on the attorney's letter, as an evidence of the credit, and when the testimony of the attorney reduced an unqualified

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credit to be a mere condition, he ought to have been allowed the opportunity of meeting (as affidavits showed that he could meet) the change thus produced by the witness in the aspect of the credit, as originally given.

In error, from the circuit court of Marshall county; Hon. Hugh R. Miller, judge.

John S. Mitchell, assignee of Street and Mitchell, for the use of Joseph D. Beers, by Lucas & Lane his attorneys at law, sued William Arthur on a note for $1102.09, due on the second of December, 1839. The suit was brought in June, 1843. The defendant plead *non assumpsit*. At the March term, 1845, the cause was continued on the affidavit of Arthur, that he was entitled to a credit of one hundred dollars on the note; which he would prove by John H. Dunlap of Tennessee.

After various proceedings, a trial was had at the June term, 1846, when the jury, on the 10th of that month, found a verdict for the plaintiff, for $1474.52.

On the 26th of June, Arthur moved for a new trial; the motion being overruled, he filed a bill of exceptions, from which it appears, that on reading the note sued on, the plaintiff rested his case; the defendant then read the receipt of John H. and James T. Dunlap, at one time attorneys for the plaintiff, and who had the note for collection, in which they acknowledge the receipt of certain collateral papers furnished them by Arthur, and state, that fifty-six dollars had been paid by Arthur to Lucas & Lane, and forty-four dollars to Dunlap. And also a letter from Lucas & Lane to John H. Dunlap, dated May 1, 1841, enclosing the note of Arthur to Dunlap, which letter was as follows:

"John W. Dunlap, Esq., Dear Sir. Enclosed, please find W. Arthur's note, with the explanations afforded by the respective communications of Messrs Arthur & Beers, a copy of which is herewith transmitted. W. Edmonds's note will be handed you as collateral, and when realized we are to remit, as you will see by Beers's communication. Any instructions in the intermediate stages of the progress of this business, you will look to the parties in New York for; as we have no discretion, nor further agency in it, than to simply remit when collected. Mr.

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Arthur has paid our fee, say fifty-five dollars and postage, one dollar, which will be charged to Beers, and credited on the debt due from Arthur to Beers; please send receipt for the note as Beers holds ours, and it is contemplated, as you will see, that the remittance eventually be made by us.

LUCAS & LANE."

The plaintiff then offered Lucas as a witness, to prove the nature of the payment of the fifty-six dollars, and explain the letter of Lucas & Lane. The defendant objected to his competency, but the court allowed him to testify. He stated that Beers, in 1841, placed the note for suit in the hands of Lucas & Lane; they sued Arthur upon it; Arthur assured witness, if the note was sent to Tennessee, it would soon be paid out of debts due him there. The witness obtained authority from Beers to dismiss the suit in this state, and sent the note to Tennessee on Arthur's paying Lucas & Lane's fees; Arthur did so, and at the same time informed witness there was an agreement between himself and Beers, that if the money was paid soon after the note reached Tennessee, the fee paid witness was to be credited on the note. Witness had no other evidence of this agreement but Arthur's statement; he believed it; and as Arthur told him, Dunlap was a very particular person, and would not allow him the fifty-six dollars without authority from the witness, and thus he would lose the amount. The witness agreed to write to Dunlap to allow the credit on the money's being paid, and witness accordingly wrote three or four letters to Dunlap, and none of them suiting Arthur, he told him to frame a letter himself as he wished it; Arthur did so, and wrote all the concluding part of the letter sent to Dunlap, and witness copied it and handed the letter to defendant who carried it off. Two or three years after the note was returned to him for suit again; he was about to sue upon it in the federal court, when Arthur promised if he would sue in the state court he would throw no obstacle in the way of a judgment. He sued in the state court, and the result had been all the opposition in Arthur's power. On cross-examination, he stated that he had enclosed no letters to Dunlap in his letter sending the note of Arthur to him.

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This was all the evidence.

The bill of exceptions contains the affidavit of Arthur in behalf of the motion for a new trial on the ground of surprise, in which he states at length the causes which led the first suit to be dismissed and the note sent to Tennessee, and contains copies of all the correspondence on the subject, including the letter of Beers to Lucas & Lane, instructing them to dismiss the suit and send the note to Tennessee, which letter concludes as follows: "We have concluded to accept Mr. Arthur's proposition, thinking it most certain to secure the eventual payment of our claims; should you see nothing in this arrangement to affect my interest injuriously, I will thank you to have the same carried into effect, and to forward the note of Arthur to John H. Dunlap for that purpose, retaining out of proceeds of claim, when collected, the amount of your charges in the business, and you remit the residue to me. Very respectfully, &c.

"J. D. Beers."

The affidavit of Arthur details at length the various steps in the progress of the suit, and undertakes to explain the mistake into which he swears that Lucas had fallen. He denies the truth of the evidence of Lucas, and states that Lucas confounds the copying by Arthur of the correspondence enclosed by Lucas to Dunlap with the writing the letter to Dunlap. That he had supposed, until the trial, that there could be no difficulty about allowing him the credit on the note; he was astounded at the testimony of Lucas, and immediately after the trial wrote to Dunlap for the copies of all the letters sent to him by Lucas & Lane, which Dunlap immediately sent to him, and he had but just received them. The letter of Beers to Lucas & Lane, showed that Lucas was mistaken as to the terms on which he was to dismiss the first suit, and the copies enclosed to Dunlap by Lucas showed that Lucas was mistaken in stating that he had sent no copies in his letter to Dunlap; that the fact that these copies were in the hand-writing of affiant tended to explain the mistake that Lucas had fallen into as to affiant's having written the latter part of the letter to Dunlap. He also states that Lucas did not send the letter to Dunlap by him.

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The affidavit at great length explains and details these circumstances, the reason why the fifty-six dollars was paid Lucas at the time, why these letters were not produced and had in readiness at the trial, and also why affiant told Lucas to sue in the state court and he would interpose no obstacle. He then thought the $100 was credited on the note.

Arthur prosecutes this writ of appeal.

W. F. Stearns, for plaintiff in error, argued these points at length:

1. That Lucas was an incompetent witness. He cited *Fuller* v. *Wheelock*, 10 Pick. 135; *Emerton* v. *Andrews*, 4 Mass. 653.

2. A new trial should have been granted on the ground of surprise. On this point, Mr. Stearns reviewed the testimony.

3. That the verdict was against testimony; Lucas's evidence was contradictory, and not sufficient to overthrow the positive statement of his letter.

Watson, for appellee,

Insisted, 1. That as no *exception* was signed at the time that Lucas's evidence was admitted, the point could not be afterwards objected. He cited 1 How. (Mi.) R. 572; 7 Ibid. 164, 346; 9 Wheat. 651; 6 Wend. 268; 3 A. K. Marsh. 360.

2. That Arthur had plead *non assumpsit*, and filed no bill of particulars, and was therefore not prejudiced by Lucas's testimony, as he had no right to *prove* an offset. H. & H. 590, § 7; 2 S. & M. 473, 514; 4 Ibid. 175; 4 How. (Mi.) R. 404.

3. Lucas was a competent witness; in no wise interested; if the fifty-six dollars had been allowed, it would have been Beers's, not Lucas's loss.

4. A sufficient ground for new trial on account of surprise was not made. Arthur knew the credit would be contested; his affidavit for a continuance and former trial showed him that.

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D. C. Glenn, for plaintiff in error, in reply.

1. The objection that the exception to the admissibility of Lucas as a witness, was not taken at the proper time, is not tenable, and the authorities cited do not apply. H. & H. ch. 40, sec. 52, p. 493.

2. The objection that no bill of particulars was filed, was not made below, and will not be regarded here.

3. Lucas was incompetent. 4 John. 493; 1 Taylor (N. C.) Rep. 5; 2 Dallas, 50; 1 Dudley, 81; 1 Mass. Rep. 93; 3 Ibid. 82; 4 Ibid. 488, 653; 13 Ibid. 199; 2 McCord, 375; 5 Conn. 258; 7 Hals. 240.

4. On the ground of surprise the new trial should have been allowed. Mr. Glenn elaborately reviewed the proof and the affidavit of Arthur, and insisted that the correspondence exhibited in the latter wholly disproved Lucas's evidence, and would necessarily, on another trial, change the result. He cited *Palmer* v. *Popelstone*, 1 Hawks, 307; 2 J. J. Marsh. 575; 1 Bos. & Pull. R. 427.

5. The verdict was contrary to the evidence. Lucas's testimony should have been discarded by the jury; it is incredible in itself, self-contradictory, and disproved. This point was also discussed at length.

Mr. Justice THACHER delivered the opinion of the court.

This was a motion for a new trial, upon the grounds of the incompetency of a witness and surprise upon the trial.

One of the matters in issue upon the trial was the legality of a credit of fifty-six dollars, claimed by the defendant. The promissory note, the ground of the action, was originally put in the hands of Lucas & Lane, attorneys at law, for collection, and suit instituted. It was afterwards directed by the beneficiary in the note, Beers, to be sent to Dunlap, upon an agreement of the parties as to its payment. Before this was done, Arthur, the maker of the note, paid Lucas & Lane the attorney's commissions and postage, amounting to fifty-six dollars, which, upon the trial below, he claimed as a credit. Upon the trial, in support of this set-off, he produced a letter of Lucas

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& Lane to Dunlap, which concluded as follows: — "Mr. Arthur has paid our fee, say $55, and postage $1, which will be charged to Beers, and credited on the debt due from Arthur to Beers. Please send receipt for the note, as Beers holds ours, and it is contemplated, as you will see, that the remittance eventually be made by us." The plaintiff then offered Lucas as a witness, who testified that the credit mentioned in the letter was not absolutely to be made, but that the directions of Beers, who had made an arrangement with Arthur, here, to withdraw a suit then pending upon the note, provided Arthur would pay the fee of Lucas & Lane, and that this was the only consideration upon which Lucas & Lane would consent to the withdrawal of that suit; that Arthur consented to this, but added that he had an understanding with Beers, that if the amount of the note was promptly paid in the hands of Dunlap, that then the amount of fifty-six dollars should be credited on the note, and desired Lucas & Lane to communicate the fact to Dunlap; and that the witness undertook to write to Dunlap, as desired, but his statement of the agreement not satisfying Arthur, he finally permitted him to frame in his own language the entire latter part of the letter to Dunlap, as above quoted, which he copied and transmitted to Dunlap.

The testimony of Lucas was objected to on the ground of interest. The only possible interest that Lucas could have in such a state of the case, would be to increase the amount of the judgment in the sum of fifty-six dollars, thereby to obtain his commissions as attorney upon that enhanced sum. But, if it were established that the regular commissions of attorneys were a good ground to exclude them as witnesses, the record in this case is silent as to the material fact that Lucas & Lane were to become entitled to commissions in this particular case. There is nothing that exhibits that Lucas had any interest in the result of the suit. At all events, his interest was balanced, and his testimony might subject him liable to plaintiff or defendant, according to his testimony and the true state of the facts.

But Arthur might well depend upon the letter of Lucas &

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Lane, which authorized an absolute and unconditional credit to be made upon the note, and, although Lucas was competent to explain his own letter, still he might fairly charge surprise upon the trial, when he found the unqualified credit contained in the letter was proved to be in point of fact coupled with a condition, and he should have been permitted an opportunity to meet this charge in the aspect of the credit, as the witness had originally presented it by his own letter. Under all the circumstances of this branch of the case, we think the court below erred in overruling the motion upon the ground of surprise.

Judgment reversed, and new trial awarded.

Union Bank of Tennessee *vs.* Mary P. Govan.

Where a party to a negotiable paper, before its maturity, has changed his residence, and *his removal is known*, notice should be sent to him at his new place of domicil, if known, or if by reasonable diligence and inquiry it can be ascertained; but this rule presupposes *knowledge* of the removal; without such knowledge, notice, it seems, to the former place of residence will be sufficient.

Where, therefore, P., residing in Somerville, Tennessee, a distance of two hundred miles from Nashville, indorsed a note for G., also a resident of Somerville, to be discounted by a bank in Nashville, and that bank discounted the note, knowing the then residence of the parties, and, afterwards, at its maturity, G. paid part of the note, and renewed the residue by executing a new note, with P. as indorser, falling due at a subsequent period; shortly before the execution of which last note, P. had removed to Mississippi, but the knowledge of the removal was not brought home to the bank, it was *held*, that notice of protest of the second note sent by the bank to P., at Somerville, Tennessee, was sufficient; it would have been otherwise, if knowledge of the removal had been brought home to the bank.

It seems that where, after a note has been protested for non-payment, the indorser executes a deed of trust to secure its payment, it would furnish strong presumption that notice had been received, or else waived by the subsequent agreement.

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Union Bank of Tennessee v. Govan.

Where, immediately after the entry of the rendition of a judgment, the record recited, "And *the defendant* agrees to stay execution until the first of May, 1840," it was *held*, that even if by *defendant* was meant *plaintiff*, it did not appear that the stay was made on *consideration*, or to be binding on any party, and if a mere voluntary offer, it did not discharge a surety to the note on which the judgment was rendered.

An agreement to give the principal time, which will discharge a surety, must be positive and binding, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence was given; therefore, where the plaintiff in a judgment directed the sheriff to hold up an execution against the defendant, until he should hear from him again, it was *held* not to be such a stay of the execution as would discharge a surety to the note on which the judgment was rendered.

An attorney at law, as such, has not power to grant a stay of execution to the principal defendant, that will discharge a surety; unless he have express authority so to do from his client, a stay of execution by him will not be binding.

In error, from the decree of the vice-chancery court at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

On the 23d of February, 1847, Mary A. Pugh filed her bill against the President, Directors and Company of the Union Bank of Tennessee, and others, in which she alleges, that on the 28th of February, 1838, Andrew R. Govan, being in debt to the bank, in order to secure it, made his note for $6,450.64, due twelve months after date, which she, with others, indorsed, payable at the bank at Nashville. At the time of making this note, and of its maturity, she lived in Marshall county, Mississippi; and never received notice of protest for the non-payment of the note, and did not know it was not paid until in September, 1841.

That in the year 1839, Govan, and the other parties to the note, were sued in Fayette county, Tennessee; the writ was served on Govan only; the suit was discontinued as to the others; and, in October, 1839, a judgment was rendered, when, by an agreement between the attorney of the bank and Govan, execution of the judgment was suspended until May, 1840, at which time an execution issued was levied on six hundred and sixty acres of land, worth $10 per acre, when, on the 26th day of August, 1840, the attorney of the bank gave written instructions to stay the execution until further orders. When these

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stays were given, Govan paid $1800 of this debt, and had ample property in Tennessee to pay the residue; but, by these stays, the lien was lost, and with it recourse to his property. In June, 1841, Govan died in Marshall county, Mississippi, greatly embarrassed, having previously conveyed his property in trust, to secure other debts.

That in the month of February, 1842, she was sued by the bank as indorser on this note, in Marshall county in this state; pending this suit, on the 16th of September, 1842, she executed a deed of trust to secure this debt, on certain named slaves, to William Crump and Charles L. Thomas, and time was extended to her by the bank until June 1, 1844.

When she proposed and executed this deed of trust, she was wholly ignorant of the course of the bank touching this debt, and of her own release; she was alarmed at the suit against her, and the bank, in order to entrap her into the execution of the deed of trust, suppressed and concealed from her these facts; that she was a mere accommodation party to the note. She prayed that the deed of trust might be cancelled, and she discharged from her indorsement.

The bank stated, in its answer, that on the 20th of February, 1838, it held a note for $9,238 then due, made by Govan, indorsed by Mary A. Pugh and others, which it had discounted for Branden, McKenna and Wright, who made a payment reducing the note to $6,450.64, and in renewal of the residue offered, and the bank accepted and discounted the note named in the bill. The bank states that it did not know where Mrs. Pugh lived when she indorsed the last note; when she indorsed the first, she and Govan lived in Somerville, Fayette county, Tennessee, as was well known to the bank, which never heard of her removal, and when the second note was protested, notice was duly sent to Somerville, which it is insisted was sufficient legal notice. That the suit against Mrs. Pugh was commenced on the 21st of February, 1842, and the note and protest were filed with the declaration, and, on the back of the protest the notary had indorsed, that the notice of protest was sent to Somerville, and this protest and the note remained in the papers

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from the time the suit was brought, until in consequence of the execution of the deed of trust, it was dismissed; that the deed of trust was executed when the suit was about to be called for trial, and on an agreement for forbearance, which facts the bank insists estop her from inquiring into the sufficiency of notice; and that her negligence in ascertaining the facts estops her.

The bank admits the suit against Govan, but denies all knowledge of the alleged stays of execution; or any authority to its attorney to make them, and insists if made by the attorney, they are not binding on the bank; that since the filing of the bill, the bank having heard of these stays, for the first time, by the bill, sought information on the subject, and found that an indorsement had been made on the clerk's docket of the court in Fayette county, "execution not to issue until the first Monday in May, 1840;" but by whose authority this had been done, they had not been able to find out. They deny the stay alleged to have been made in August, 1840. The answer proceeds to detail at length the state of Govan's property, and its disposition by him, in order to show that no loss of lien had been occasioned by these stays; but it is not deemed material to the case to set them out. The bank denies all concealment and fraud; insists that the second note was given in renewal of the first, and that Mrs. Pugh was a party to the first, and reaped the benefit of the indulgence granted, and could not, therefore, be considered an accommodation indorser merely.

The bank also states, that in January, 1844, Mrs. Pugh had filed her claim as indorser on this note, before the commissioner of insolvency on Govan's estate, and been allowed the full amount of it, which it is contended is a bar to the relief sought by her.

Mary P. Govan, executrix of Mary A. Pugh, filed her amended bill, stating the death of Mrs. Pugh, insisting upon the facts of the original bill, and stating, in addition, that Mrs. Pugh was very old and infirm when she made the deed of trust referred to, and her business was managed by William Crump, as her agent; that ever since 1837, her post-office had been at Lama, in Marshall county, Mississippi, thirty miles from Somerville,

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which was two hundred miles from Nashville, and no notice had ever been sent there. That when the judgment was rendered against Govan, at the time of entering it up, it was agreed by the attorney of the bank and Govan, that there should be a stay of execution, but the clerk, by mistake, entered it in these words; "*The defendant* agrees to stay execution until first of May, 1840;" she repeats again the stay of execution by the attorney of the bank in August, 1840, and filed a record of the judgment showing these facts.

She repeats the ignorance of these facts by Mrs. Pugh and her agent, and the wilful concealment of them by the bank and its agents, and insists that this fraud vitiated the deed of trust. She admits, that she had presented the claim to the commissioners of insolvency on Govan's estate as a liability for him, which she might be compelled to pay, but denies that she thereby forfeited any of her rights; Govan's estate was insolvent, and she had not received and was not likely to receive anything from it.

The bank answered the amended bill in detail, setting up the same facts and presenting the same issues that were presented by the original bill and answer, and demurring to much of the amended bill, because it was identical with the original bill, and had already been answered.

A great deal of proof was taken on each side; but in view of the positions taken by this court, it is not deemed requisite to set it out, the case having been in a great measure determined on the facts, as set forth in the pleadings in behalf of the complainant below.

It will be sufficient to state, that there was no proof that the bank knew of the change of Mrs. Pugh's residence; or had ever given any authority to the attorney to make the alleged stays, or that they were made on any consideration, or upon what inducement or contract.

The vice-chancellor decreed, that the deed of trust be cancelled, and the bank and the trustees be perpetually enjoined from acting under it. The bank prosecuted this writ of error.

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W. Yerger, for plaintiff in error,

Insisted, in a written argument of great length, in which he reviewed the facts of the case, that equity had no jurisdiction of the bill, except on the ground of the fraud of the bank, which was denied fully by the answer and the denial sustained by the proof. He contended, that the defence set up in the bill was waived by the execution of the deed of trust, and cited *Tibbets* v. *Dowds*, 23 Wend. 386; *Robbins* v. *Pinckard*, 5 S. & M. 51, and insisted, that if the complainant ever had a valid defence at law, she had voluntarily waived and abandoned it, and equity could not restore it to her. 6 Humph. 248; *Edwards* v. *Roberts*, 7 S. & M. 555.

F. Anderson, on the same side,

Made an oral argument on the law and facts of the case, in which he insisted, that, under the circumstances, the notice of protest was sufficient; the necessity, for notice, was dispensed with by the execution of the deed of trust, and the fact of notice could not be inquired into; that no fraud had been practised by the bank; sufficient to put Mrs. Pugh on the inquiry had been established, before she made the deed of trust; that the alleged stays of execution were not valid and binding, being merely voluntary, and beyond the scope of the power of an attorney at law.

Lucas, *Watson*, and *Clapp*, for defendant in error, contended,

1. That the notice of protest was not sufficient to bind Mrs. Pugh. They cited 1 S. & M. 261; 4 S. & M. 177; 4 Hump. 39; Ib. 519; 6 S. & M. 255.

2. That the attorney at law had power to give the stay of execution. 7 Cow. 739; 5 Peters, 98–112; 4 How. 246; 7 Cran. 436; 10 Johns. 221; 3 J. J. Marsh. 532; Sto. Ag. 53; Ib. 85; 2 Pet. 329.

3. That the first stay in the judgment discharged the surety. 6 Munf. 6–9; 2 Rand. 333–435; 5 Ohio, 214, 215; 6 Ib. 17; 5 Pet. 99; Sto. on Prom. Notes, § 413; 6 S. & M. 24–37.

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4. The second Stay in August, 1840, had the same effect. Burge on Suretyship, 206; 2 Swanst. 585; 1 Munf. 269; 7 Leigh, 244; 6 S. & M. 238.

5. That the execution of the deed of trust under mistake and ignorance of her rights did not bind her. 4 Man. & Grang. 11; 4 Hump. 336; 23 Wend. 379; 5 S. & M. 51.

6. The dismissal of the suit, the forbearance and the other circumstances are not sufficient considerations to make Mrs. Pugh liable on the new assumpsit implied from the deed of trust, if not liable before; nor is she estopped from setting up her defence. Sto. on Cont. § 359; Sto. Eq. § 130; 5 Hump. 529–547; 9 Leigh, 342; 2 Rob. R. 271.

7. Under the facts a court of equity will give relief. 1 Sto. Eq. § 146, n.; 5 Hump. 529; 1 Sto. Eq. § 399, 400; Ib. 140–142; 5 Pet. 99; Sto. Eq. § 235–237; 2 Lom. Dig. 318, § 57; 2 Exchq. R. 55–59; 29 Eng. Ch. R. 188–193; 2 Dessau. 162–169; 1 Pet. 1–15; Sto. Ag. 140; 1 Sto. Eq. § 408; 2 Vern. 609; 2 Hill (N. Y.) 451–464; 3 Hill, 262; 1 Sto. Eq. 399–400; 5 Call, 519; 13 Pet. 26; Ib. 36–38; 8 S. & M. 139.

8. The presentation to the commissioners of insolvency on Govan's estate is no bar to the complainant. 9 Mass. 332; Sto. on Prom. Notes, § 278; 8 Leigh, 164; 5 Ib. 522; 6 How. 131.

George S. Yerger, for plaintiff in error.

1. The deed of trust admits Mrs. Pugh's liability. It is presumptive evidence of notice to her. It is presumptive evidence that she had no legal defence. *Robbins* v. *Pinckard*, 5 S. & M. 51.

To avoid its effect she must prove negatively, 1st. That there was no legal notice, or 2d. That she was legally discharged by indulgence; 3d. That she did not know these facts; 4th. That she could not ascertain them by reasonable diligence.

As to notice, she must prove that the bank knew of her removal, otherwise the notice was good. 4 Hump. R. 39; 3 Wend. 408; 5 Ib. 587.

2. The stay of execution by the attorney of the bank did not release her.

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There is no averment in the bill that there was an agreement to let judgment go, on condition the stay should be given. There was no consideration; none, whatever. An execution could have issued the next day. *Hamer* v. *Johnston*, 4 How.

3. The attorney of the bank had no authority to make this agreement. 10 Johns. R. 220; 8 Ib. 361; 1 Pick. 347; 2 Bibb, 382.

He has no authority to give time or indulgence so as to discharge a security. 3 J. J. Marsh. 532; 4 Dessau. 45.

4. The deed of trust was a distinct contract, founded on a good consideration, to wit, the dismissal of the suit, forbearance, &c.

If this contract is set aside, the bank cannot be placed in *statu quo;* the claim will be barred, and the recourse against the indorsers is lost. In such case clear and undoubted evidence is required, that she was defrauded, or — 1st. That she did not know the facts; 2d. That she could not, by reasonable diligence, have ascertained them.

5. The want of notice and the indulgence, were both defences at law; she could have made them in the suit brought. If she did not make the defence, but let a judgment go, or made a compromise or deed, thereby voluntarily abandoning her defence, equity cannot relieve her, unless for fraud, or clear palpable mistake or ignorance, which could not have been ascertained upon inquiry.

6. The proof of the notary having sent notice to Somerville, was filed in February, 1842, in the suit, and was in the papers until the deed of trust was executed, six months. Here was ample time and ample means to ascertain the fact.

1. Can a party, as a matter of policy and law, allege want of knowledge of a fact, which is plead as evidence in the cause, to get rid of a compromise or contract?

2. She must have known she had no personal notice, if she did not receive the notice; and if she did receive it, she saw it was directed to Somerville.

A party who promises to pay, and who must know she has no personal notice, is bound. 5 Humph. 300; *Breed* v. *Hillhouse*, 7 Conn. R. 523; 1 Story's Eq. sec. 146; Chitty on Bills, 536; *Howard* v. *Meek*, decided at this term.

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William F. Stearns, on the same side, for the Union Bank of Tennessee, assumed similar positions in a written brief.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

On the 16th of September, 1842, Mrs. Mary A. Pugh conveyed certain property in trust to secure a debt due to the Union Bank of Tennessee, and the object of the bill in this case is to have the deed cancelled, and to be relieved from the debt secured by it.

The history of the debt is this: — On the 19th day of October, 1837, a note made by A. R. Govan, indorsed by Mrs. Pugh and others, for $9228, was discounted by the bank. It fell due on the 23d of February, 1838. On the 20th of that month, Govan, the maker, made a payment which reduced the amount to $6450, and then gave a new note for that sum with the same indorsers, payable in twelve months. The maker and first indorser, Mrs. Pugh, resided at Somerville, Tennessee, when the original note was given, and at the time of its discount. Mrs. Pugh removed to Marshall county, in this state, some time in 1837, and on the 21st of February, 1842, suit was instituted against her in the circuit court of Marshall county. By giving the deed of trust, she obtained further time for the payment of the debt, and the suit against her was dismissed. The grounds relied on for avoiding the deed of trust are two; first, that she received no notice of the non-payment of the note by Govan, notice of non-payment having been improperly directed to her at Somerville, after she had removed to Mississippi; and second, that the bank had sued Govan in Tennessee on the note; had recovered judgment, and had given such a stay of execution as discharged the indorsers, of which facts she was not apprized when the deed of trust was executed.

On the first point the case cannot admit of a doubt. It does not necessarily follow, that if the notice was insufficient, that it would be good ground for avoiding this deed of trust. It is a subsequent agreement, entered into with great solemnity, and would furnish a strong case for a presumption that notice had been received, or if not received, that it was waived by the

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subsequent promise. See *Robins et al.* v. *Pinckard*, 5 S. & M. 51. We shall not consider it, however, in this point of view, since we are satisfied the notice was sufficient. This note was made in renewal of a former note, due 23d of February, 1838. At the time of making, and at the time of discounting the original note, the parties resided at Somerville, and that fact was known to the bank. They had been credited as citizens of that place. The renewal was made under precisely similar circumstances, except that a change of residence took place shortly before the last note was made; the time is not precisely stated. The renewal is but a part of the original transaction, and the bank must be presumed to have renewed with a view to the same state of things. If Mrs. Pugh had, in the intermediate time, changed her domicil, it was her duty to have given information of that fact, inasmuch as she was entitled to notice of non-payment, so that she might protect herself.

Judge Story thus lays down the principle where a change of domicil has taken place. "If the party has changed his domicil after he became a party to the bill, and his removal is known, notice should be sent to him at his new place of domicil, if known, or if, by reasonable diligence and inquiry, it can be ascertained." Story on Bills, 356, sec. 297. The rule requiring notice to be sent to the new place of residence, or diligence to be used to ascertain it, presupposes *a knowledge* on the part of the holder that the indorser has removed. Without such knowledge there is no foundation for the exercise of diligence. The bank having transacted business with Mrs. Pugh whilst she resided at Somerville, some two hundred miles from the location of the bank, had no right, in a continuation of the original transaction, to presume that she had changed her domicil.

This case does not differ from the case of the *Bank of Utica* v. *Davidson*, 5 Wendell, 587. There the note was given in renewal. One of the indorsers had changed his reside n shortly before the date of the last note, but the bank not being aware of this, sent notice to the place where he had resided when the first note was made, and it was held sufficient.

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Our conclusion is also fully sustained by the case of the *Bank of Utica* v. *Phillips*, 3 Wend. 408. In that case the indorser had removed after the note was made, but notice sent to the place of his former residence was held sufficient, because the holders had no reason to expect such an event, and no considerations of diligence could have prompted them to institute such an inquiry. The court say, where the place of an indorser's residence is established at the time when a note having the usual time of bankable paper to run, is discounted, and is at such a distance from the place of payment as to repel the presumption that a removal (in case it happens before the note falls due,) would come to the knowledge of the holders, and no actual knowledge is brought home to them, a notice of demand and non-payment, directed to such place of residence, is sufficient."

The case of *McMurtrie* v. *Jones*, 3 Wash. C. C. Rep. 206, was of a similar character. The indorser had removed before the maturity of the note, and notice left at his former boarding house was held sufficient.

The principle of these cases is, that where a party is contracted with or trusted, and is known at the time to reside at a particular place, the party has a right to act upon the presumption, in reference to all matters connected with the same transaction, that he continues to reside there, unless such presumption is rebutted by circumstances calculated to show that the party knew of the removal of his debtor. Any other rule would be fatal to the credit of negotiable paper.

But the case admits of this further remark. The question of diligence is not raised in this inquiry. It may be that proper diligence was used, even admitting that it was necessary. It does not follow, even in cases where the law requires the holder of negotiable paper to make inquiry as to the residence of the indorser, that every misdirection of notice will discharge the indorser.

In the next place, was Mrs. Pugh, as indorser, discharged because of the stay of execution given on the judgment against Govan in Tennessee?

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The first stay of execution relied on is one which was given when the judgment was rendered. It follows the judgment in these words: "and the defendant agrees to stay said execution until the first of May, 1840." The bill alleges that this was an agreement made by the plaintiff's attorney, and not by the defendant as it was entered. It does not appear to have been made on consideration, or to be binding on any party. If, in the extent and nature of the argument, it was a mere voluntary offer, it was no discharge of the surety; and, to test its validity, suppose execution had been sued out before that time, would any court have set it aside as irregular?

In the next place, after execution issued, the plaintiff's attorney wrote a note to the sheriff in the following words: "You will hold up the execution against A. R. Govan in favor of the Union Bank till you hear from me again." The decisions of this court are conclusive on this point. This direction given to the sheriff is almost identical with that which was given in the case of *Newell & Pierce* v. *Hamer*, 4 Howard, 684, which was held not to discharge a surety. This case is weaker than that in one point of view. There, the order was given by the plaintiff; here, it is given by the plaintiff's attorney. The principle there settled was, that an agreement which will discharge the surety, must be positive and binding, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence was given. The same principle has been reasserted in all the subsequent cases where the question has been raised. *Payne* v. *Commercial Bank of Natchez*, 6 S. & M. 24; *Montgomery* v. *Dillingham*, 3 Ibid. 647; *Johnson* v. *Planters' Bank*, 4 Ibid. 165; *Wadlington* v. *Gary*, 7 Ibid. 522. Neither of these agreements was founded on any new or valuable consideration, nor were they such as could be enforced in a court of justice.

But we cannot admit that, if these directions or agreements could be considered binding, the attorney had any power which would enable him to jeopardize the rights of his client. It appears very clearly in proof, that no such authority was given to the attorney by the plaintiff, and the authorities are very clear

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that he has no such power unless it is expressly given. It is in direct violation of principle. *Clark* v. *Kingsland*, 1 S. & M. 248; *Dunn* v. *Newman*, 7 How. 582; *Garvin* v. *Lowry*, 7 S. & M. 24; 10 Johns. 220; 1 Pick. 347.

The complainant therefore fails on both grounds taken, to show that the claim to relief is well founded. We shall not enter into an investigation of the question, as to how far the giving of the deed of trust was a waiver of any previous irregularity, as it is not necessary that we should decide that point.

Decree reversed, and bill dismissed.

Mr. Justice CLAYTON, having been counsel in the court below, gave no opinion.

ARCHY B. LAWRENCE *vs.* RICHARD FEATHERSTON.

Where the affidavit to obtain an attachment stated the debt to be a certain sum, and the bond was in double that sum, it was *held* sufficient to uphold the attachment, notwithstanding the condition of the bond recited the debt claimed at ten dollars more than the affidavit. The recital in the latter must prevail.

The statute (H. & H. 556, § 35,) which authorizes constables to execute attachments against *absconding debtors*, is enabling in its character; and does not embrace the case of *non-resident* debtors; constables, therefore, cannot execute attachments returnable into the circuit courts against *non-residents*.

A bond, therefore, taken by a constable from a non-resident to replevy property attached, is not binding, because taken by an improper officer; and should with the levy be quashed on motion.

Where, however, the attachment bond, affidavit and writ are regular, but the latter is served by an improper officer, it will be improper on that account to quash the entire attachment; the levy and return on the writ should be quashed; and where the defendant has entered his appearance, the court should require him to plead to the action.

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Lawrence v. Featherston.

On appeal from the circuit court of Warren county; Hon. George Coalter, judge.

Archy B. Lawrence, on the first of January, 1845, made oath before N. G. Byson, Esq., a justice of the peace for Warren county, that Richard Featherston, a non-resident, owed him "two hundred and thirty-seven dollars and sixty-two cents, or thereabouts." The magistrate took a bond from Lawrence with surety, in the penalty of four hundred and seventy-five dollars and twenty-four cents, payable to Featherston; the condition of which recited, that Lawrence had "prayed an attachment at his suit against the estate of the above-named Richard Featherston, for the sum of two hundred and *forty-seven* dollars and sixty-two cents." In other respects the bond conformed to the statute.

The writ of attachment in the ordinary form, was addressed "to the sheriff or any constable of Warren county, greeting;" on this attachment was this return; "Levied this attachment, January 2, 1845, on (describing the property and levy, &c.) whereupon said Richard Featherston replevied the said cotton, by entering into bond according to law, with Daniel Morgan as his security, (see bond enclosed) and the said cotton was then restored to his possession. H. L. Puckett,

Constable of Warren County, Mississippi."

At the April term, 1845, of the circuit court, Lawrence filed his declaration; and at a subsequent day of the term, Featherston appeared and moved the court to dismiss the attachment, 1st. Because the attachment bond did not conform to the affidavit and writ. 2d. Because it was not executed by one authorized by law. The motion was sustained, and Lawrence appealed.

Hay, for appellant, insisted,

1. That the clerical error in the recital in the attachment bond, did not vitiate the bond; it was wholly immaterial, and could not affect the important part of the bond; the amount might have been omitted altogether. *Peck* v. *Critchlow*, 7 How. (Mi.) 243; *Lovelady* v. *Harkins*, 6 S. & M. 412; 6 How. (Mi.) 254.

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2. From all the sections of the statute considered together, especially § 25 and § 28, it seems apparent, that the term "*other officer*," as there used, was designed to apply to constables, and give them also the power elsewhere conferred expressly, in cases against *absconding debtors*.

Hutchinson, for appellee.

1. The error in the attachment bond was fatal. H. & H. 549, § 13; 1 How. (Mi.) R. 43.

2. None but a sheriff *or his deputy* can serve attachments against non-residents. H. & H. 55, § 19; Ib. 556, § 35.

P. W. Tompkins, on the same side, relied on the want of power in the constable to levy the attachment, and cited How. & Hutch. 548, § 11; Ib. 556, § 34.

Mr. Justice CLAYTON delivered the opinion of the court.

The objection to the bond and affidavit in the cause cannot prevail. The bond is in exactly double the amount sworn to, but the condition states the debt at ten dollars more than the affidavit. The latter must control. It is the foundation of the whole proceeding, and the condition cannot control it.

But the other objection is of more force. The attachment was against a non-resident defendant, and was executed by a constable. The statute which authorizes a constable to execute attachments against absconding debtors, is enabling in its character. H. & H. 556, § 35. Without its aid, where the writ is returnable into the circuit court, such officer could not execute it. We are not authorized to extend it beyond the limit prescribed by the legislature.

Before the defendant moved to quash the attachment, the property had been replevied, and consequently released. The bond was not binding because taken by an improper officer, and one not authorized to levy the attachment. This was good cause for setting aside the bond, and the levy and return of the attachment. But this could not operate to affect the attachment itself. That was legally issued, and any impropriety in its exe-

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cution, could not relate back so as to avoid the process itself. The court went too far, therefore in quashing the attachment. It should have set aside the levy, the return and the bond, and as the defendant was then in court, having entered his appearance, should have required him to plead to the action. For this error, the judgment will be reversed, and the cause remanded for further proceedings, in conformity with this opinion.

Judgment reversed.

LINDSEY S. WELLS, use of Joseph Marlow, Jr., *vs.* JAMES BRANDER ET AL.

An attachment was sued out at law against non-residents, and a garnishee summoned to answer, on the 15th of March, 1842. He answered, that he was the administrator of an insolvent estate that would owe something to the defendants in the attachment, but that they had filed their petition in bankruptcy under the act of congress, on the 10th day of March, 1842, and had been declared bankrupts on the 6th day of April of that year; on this answer the court below discharged the garnishee. *Held*, that it was erroneously done; that the lien attached in favor of the attaching creditor, from the time of the service of the process of garnishment, and could not be defeated by the declaration of bankruptcy made afterwards.

The mere declaration of bankruptcy is but an incipient step in the proceeding for a final decree, and is not evidence of the transfer of all the applicant's effects under the act of congress.

ON appeal from the circuit court of Holmes county; Hon. Robert C. Perry, judge.

Joseph Marlow, Jr., on the 14th day of April, 1842, made oath before a magistrate of Holmes county, that James Brander and others, partners, under the style of Brander, McKenna & Wright, were in debt to him in the sum of $400, and were non-residents; bond was given, and a writ of attachment issued, on

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which the sheriff returned, "executed the 15th March, 1842, by summoning Hugh H. Fultz as a garnishee."

At the April term, 1842, of the circuit court, Lindsey S. Wells, for the use of Joseph Marlow, Jr., filed his declaration on this attachment.

Proof of publication, as against Brander, McKenna & Wright, was made, and at the April term, 1843, a verdict for $404.24, was rendered against them. A judgment *nisi* was entered against Fultz, and a *scire facias* issued. It was afterwards set aside, and, on the 28th of April, 1845, Fultz answered that he was administrator *de bonis non* of *T. M. Scurlock*, deceased, that Brander, McKenna & Wright, had laid before the commissioners of insolvency of that estate, a claim for $2868.75; and the estate would probably pay six cents in the dollar, that the defendants were bankrupts, but whether before or after he was summoned as garnishee, he did not know.

On the 10th of June, 1846, he filed an amended answer, stating that the defendants filed their petition for the benefit of the bankrupt law in the district court of the United States for the Eastern District of Louisiana, on the 10th day of March, 1842, and he accompanied his answer with a certified transcript from that court.

This transcript, after its caption of names, parties, court, &c., proceeded thus, "petition filed on the 10th day of March, 1842; order of the court issued same day for publication, in the New Orleans Bee and the Morning Advertiser, directing all persons interested to appear and show cause on the 6th of April next, why the prayer of the petitioners should not be granted, and on the 6th of April they were accordingly decreed bankrupts, and assignee appointed.

"I, N. R. Jennings, clerk of the district court of the United States for the district of Louisiana, do hereby certify the above to be a true copy from the bankrupt proceedings of Brander, McKenna & Wright, and numbered one hundred on the docket of this court. In testimony," &c.

On the 10th of June, 1846, the circuit court, on motion upon

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this answer, discharged the garnishee, and the plaintiff below appealed.

H. W. Brown, for appellant, contended,

1. That the lien was fixed by the attaching process, before the declaration of bankruptcy, and that the act of congress could have no relation back to divest their lien.

2. That the act of congress expressly preserved and retained all liens previously fixed.

3. That the certificate was of the mere declaration of bankruptcy, and for aught that appeared, they might never obtain their final discharge.

W. R. Miles, on the same side, argued, in addition to the other points taken for appellants, that, even if the defendants were certificated bankrupts, the garnishee could only be relieved against the plaintiff's demand, by the interposition of their assignee, or their own plea of bankruptcy.

Brooke, for appellee.

Mr. Justice THACHER delivered the opinion of the court.

Hugh H. Fultz was summoned as a garnishee in an attachment, at the suit of Joseph Marlow, Jr., against Brander, McKenna & Wright. The writ of garnishment was executed on the 15th day of March, 1842. On the 28th day of April, 1845, Fultz answered, that the defendants in attachment had a claim allowed them by the commissioners of insolvency of the estate of Scurlock, deceased, of which estate he was administrator, and that said claim amounted to the sum of $2,868.57, upon which he estimated there would be a dividend of six cents on the dollar, and that the defendants were bankrupts, but the time when they became so, he was unable to state. On the 10th day of June, 1846, Fultz filed an amended answer, in which he stated, that the defendants in attachment filed their petition in bankruptcy, under the law of the United States, on the 10th day of March, 1842. To this answer was added, as an exhibit,

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a copy of a certificate, which certifies, that the defendants were declared bankrupts on the 6th day of April, 1842.

In the first place, a lien having attached in favor of the attaching creditor from the time of the service of the process of garnishment, it could not be defeated by the declaration of bankruptcy made on the 6th day of April, 1842. The third proviso of the second section of the act of congress, to establish a uniform system of bankruptcy throughout the United States, approved August the 19th, 1841, protects all liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively.

In the next place, the mere declaration of bankruptcy is but an incipient step in the proceeding for a final decree, and the answer is incomplete in that particular. *Atkinson* v. *Fortinberry*, 7 S. & M. 302.

The decree of the circuit court discharged the garnishee upon his answer. This was erroneous, but the answer is not so definite as to enable a judgment to be rendered in this court. The cause must, therefore, be remanded.

Judgment reversed and cause remanded.

T. JONES STEWART, Guardian of Charles E. Stewart, *vs.* TRUXTON DAVIDSON, Administrator of John Netterville.

The statute of 1846, which gives the probate court the power to entertain bills of review of its own decrees and judgments, has no retrospective operation, so as to allow it to entertain a bill to review a decree of the court rendered prior to the passage of that act.

Where, therefore, a bill of review was filed in 1846 by a creditor of an estate, to review the judgment of the probate court, rendered in the year 1844, confirming the final report of the commissioners of insolvency on that estate, in which the creditor who sought the review was not included, and the order appointing commissioners was made on the 14th of December, 1843, direct-

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ing them to keep the commission open *six months*, and they reported on the 13th of June, 1844, and their report was then allowed; it was *held*, that the judgment of allowance, being on a matter within the jurisdiction of the court, was final and conclusive under the laws of this state at the time it was rendered, unless reversed by the high court of errors and appeals, and was a bar to claims not allowed therein; that rights had been acquired under it; the legislature had no power to prescribe a mode by which a judgment thus made final by existing laws, could be opened or reversed; and the bill of review must be dismissed.

Does the statute prescribing the length of time in which commissioners of insolvency shall keep the commission open, mean by the word "*months*" lunar or calendar months?

On appeal from the decree of the probate court of Wilkinson county; Hon. Francis Gildart, judge.

Charles E. Stewart, by T. Jones Stewart, his guardian, filed his bill of review in the probate court on the 12th of November, 1846, in which he alleges in substance, that he is a minor. That in 1836, one John Netterville was appointed guardian of his person and estate, by the probate court of Wilkinson county. At the time of the grant of letters to Netterville, complainant owned an estate in lands and personal property, worth at least $50,000, which went into Netterville's hands. Netterville returned no inventory of his ward's property, nor did he ever account or settle in any way with the probate court as guardian. Netterville died in December, 1840, greatly in debt and in arrears to his ward. In 1841, Truxton Davidson was appointed administrator of Netterville's estate by the probate court, and on the 14th day of December, 1843, represented to said court, that Netterville's estate was totally insolvent; and that upon such showing, the said court on that day ordered that said estate be declared insolvent, and that three persons by name be appointed commissioners of insolvency, &c. That said commissioners proceeded to act under this order; that it does not appear that any evidence was offered to the probate court, that they gave notice of the times and places of their meeting, to receive and audit claims against insolvent's estate, according to the directions of the order; and the bill denies that such notices were given.

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That said commissioners did not keep open the commission, or allow to the creditors the period of six months from the time of their appointment, as directed in the order, for the presentation and proof of their claims: But that said commissioners did on the 12th day of June, 1844, close their commission; and that on the next day, to wit, the 13th day of June, 1844, made their report; which report on that day was affirmed by said court.

The bill shews the following errors in the order or decree of the court, to wit:

1. The order of the court affirming said report, does not shew that the order appointing the commissioners was strictly complied with.

2. That six months were not allowed to the creditors of Netterville's estate, in which to present their claims: The order declaring the estate insolvent, and appointing said commissioners, having been made on the 14th December, 1843, and the commission having been closed on the 12th of June, 1844, by said commissioners, and their report affirmed by the court on the 13th of same month.

For these errors, the bill insists that the order of confirmation ought to be vacated.

That at the time of the appointment of said commissioners, and at the date of their report, he was an infant of very tender years, wholly ignorant of all the circumstances connected with the subject. That Netterville is believed to be indebted to him in at least the sum of $20,000, that no claim or demand was ever presented to the commissioners for the same; and, that in consequence of the irregular and illegal acts of the commissioners, and his own ignorance and helplessness, he has been prevented from exhibiting his claims for allowance to said commissioners.

The bill prays the order confirming the account to be set aside, and for general relief.

The orders appointing the commissioners and confirming their report, were exhibited with the bill. The former was as follows: "On the 14th of December, A. D., 1843, a shewing of the insolvency of the estate of John Netterville, deceased, was pre-

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sented to court by Truxton Davidson, the administrator of said estate, which is received, approved and ordered to be recorded. And it is further ordered, that the estate of said John Netterville, deceased, be declared insolvent, and that James N. Douty, Henry H. Davis and Thomas W. Hays, be appointed commissioners to receive and audit claims against said deceased, and that the creditors of said deceased have six months to present their claims against said estate, and that said commissioners make known the times and places of their meetings for the purpose aforesaid, by publication in the Woodville Republican, a newspaper printed and published in the town of Woodville, and by posting up notice in the town of Woodville, Fort Adams and Mount Pleasant, in the county of Wilkinson."

The order confirming their report was as follows: "June 13, 1844. A report of the commissioners of insolvency on the estate of John Netterville, was returned to court, and it appearing to the satisfaction of the court, that due notice had been given to the creditors of said estate by the commissioners, by advertising the same in the Woodville Republican, a newspaper printed and published in Wilkinson county, state of Mississippi, and by posting up notices of the same at three of the most public places in said Wilkinson county, it is, therefore, ordered by the court, that said report be received, approved, and ordered to be recorded."

To this bill, there was a general demurrer in the court below, which was sustained by that court, and the complainant's appeal prosecuted.

Gordon, for appellant, made and elaborated these points.

1. The object of the law of 1846 was to meet and correct the abuses existing in the former system as had been disclosed by the decisions of this court in *Chewning* v. *Peck*, 6 How. (Mi.) 524, *Smith* v. *Berry*, 1 S. & M. 321, *Jones* v. *Coon*, 5 Ib. 766; and this court in *McCullom* v. *Box*, 8 Ib. 619, have already held the law of 1846 competent and suitable for that end; and it is therefore applicable to this case.

2. This was, according to the rules and principle of equity, a

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proper case for a bill of review. 3 Am. Eq. Dig. 51, §§ 67, 68; 2 Hamm. R. 381; 3 Paige's Ch. 371; 2 Harrison's Ch. Pr., Forms of Decrees; 5 Mason's R. 303; 3 Am. Eq. Dig. 46, §§ 1, 2; 3 J. J. Marsh. 492; Coop. Eq. Pl. 8; 4 Mon. (Ky.) R. 146.

3. The decree contained error on its face in allowing the report of the commissioners of insolvency, because the publication showed by it was not in obedience to the order which specified the particular places. How. & Hutch. 409, § 80.

4. The commission was kept open less than six months. Where notices are to be given for a specified time, one day is to be taken inclusive and one exclusive. 1 Dunlap's Pr. 317; 3 Johns. R. 261; 16 Ib. 120. A month mentioned in a statute will generally be considered a calendar month. Mass. R. 170; 4 Ib. 160; 19 Pick. 532.

Smith and *Cage*, on same side, besides those made by Mr. *Gordon*, made and argued the following points:

1. Stewart, though not a party to the decree, had sufficient interest to maintain the bill of review. Story's Eq. Pl. 428, § 409; Mitf. Eq. Pl. 371; Coop. Eq. 95; *Webb* v. *Pell*, 3 Paige, 371.

2. The administrator was the only necessary party to the bill. *Van Vechten* v. *Terry*, 2 Johns. Ch. R. 197; *Wiser* v. *Blachley*, 1 Johns. Ch. R. 438; *Wendell* v. *Van Rensselaer*, Ib. 350; *Boisgerard* v. *Wall*, 1 S. & M. Ch. R. 427.

3. The six months prescribed by the statute for keeping open the commission, (How. & Hutch, 409, § 80,) mean calendar and not lunar months. 1 Dane's Abridg. chap. 27, art. 6, § 4. Resolution of Congress, Art. 2, in the year 1775, 2 Mass. R. 170; 2 Marsh. (Ky.) 245; 4 Litt. 20, 283; 6 Monr. R. 71; 4 Mass. 460; *Snyder* v. *Warren*, 2 Cow. 518. It is apparent, when all the statutes are taken together, that calendar and not lunar months are meant in the probate law. How. & Hutch. ch. 39, § 16, p. 472; ch. 36, § 64, p. 403; § 54, p. 401; Ib. § 80.

4. If the calendar months be meant the time was too short, even if the six months date from the declaration of insolvency,

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and end with the close of the commission. *The King* v. *Adderley*, Doug. 463; *Castle* v. *Burditt*, 3 Term R. 623; 1 Lord Ray. 650; Chitty on Bills, 205–211; 8 Mass. R. 453; *Bennet* v. *Nichols*, 4 Term R. 121; 3 Ib. 642; *Ex parte Dean*, 2 Cow. R. 605; 4 Monr. 467–474; Hardin, 457; 2 Marsh. 257; 7 Monr. 521; 1 H. Bl. 14. But the time ought properly to commence from the first publication of notice, and not from the order for publication.

Farish and *Davidson*, for appellee, contended at length,

1. That the case presented by the bill was not a proper one for a bill of review. They cited Story's Eq. Pl. § 404; *Stark* v. *Mercer*, 3 How. (Mi.) 380; *Iler* v. *Routh*, Ib. 292; Mitf. Pl. 66; 1 Ch. R. 231; 4 Vin. Ab. 414; Story's Eq. Pl. § 404; *Mellish* v. *Williams*, 1 Vern. 166; *Bonham* v. *Newcomb*, Ib. 216; 2 Mad. Ch. 538; 2 Ball & Beatty, 154.

2. Stewart was no party to the decree; his bill was therefore an original one, to set aside a decree rendered by a court of competent jurisdiction, which is not allowable. *Griffith* v. *Vertner and Wife*, 5 How. (Mi.) R. 736–741.

3. The creditors whose claims were allowed, ought to have been parties to the bill, as being parties in interest. Mitf. Pl. 32, 133; 1 Harrison's Ch. 90; 1 Johns. Ch. R. 311; *Wendell* v. *Van Rensselaer*, Ib. 344; *Hallett* v. *Hallett*, 2 Paige R. 15; *Mallon* v. *Hinds*, 12 Wheat. 198.

Mr. Chief Justice Sharkey delivered the opinion of the court.

This case comes up by appeal from the probate court of Wilkinson county. A bill of review was filed in that court, under the act of 1846, to open an administration account, under the following circumstances: John Netterville, in his lifetime, was guardian of the ward of appellant, but failed to return any inventory, or to make any settlement, and was largely indebted to his ward when he died, as it is alleged.

Davidson, the administrator on Netterville's estate, reported it insolvent, and thereupon commissioners of insolvency were appointed, to receive and audit claims against the estate, who

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were directed to keep open the commission six months, and to give notice of the times and places of meeting, in the manner prescribed in the order appointing them. This order was made on the 14th of December, 1843, and on the 13th of June, 1844, the commissioners made their report, which was approved and confirmed by the court; the order of confirmation recites that notice had been given in the Woodville Republican, and also by posting up notices at three of the most public places in the county.

The claim of the ward against the estate of his former guardian was not presented, and of course no allowance was made in his favor, and the object of the bill of review is to have this order vacated, so that he may have an opportunity of presenting his claim.

It is certainly true, as contended, that the statute of 1846 gives great latitude in reviewing the orders and decrees of the probate courts; but in this instance we are met at the threshold by a preliminary question which cuts off all inquiry into the merits of this application. This judgment of the court cannot be reached under this statute. Previous to the passage of the act, the judgments and decrees of the probate courts, on matters within their jurisdiction, were invariably regarded as final and conclusive, subject to be reversed only by appeal or writ of error. Collaterally they could not be impeached; nor could they be opened by bill of review. We have repeatedly decided on the conclusive character of these judgments, and also that the probate courts could not entertain jurisdiction of bills of review. This judgment, confirming and adopting the report of the commissioners, was rendered in June, 1844, and the foregoing remarks show its character. It was liable to be reversed by appeal, or writ of error, for matters apparent on the record, or for irregularities on the part of the commissioners, made to appear by exceptions to the report. But no such remedy was adopted. It was permitted to stand, with all the attributes of a final judgment on a matter within the jurisdiction of the court that rendered it. The parties interested in it, had acquired rights under it. It was a bar to claims not therein allowed.

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It derived its force and character from the laws of the land, in existence when it was rendered. Had the legislature power to change its character; to take from it its dignity, and impair the rights which it secured? We have decided at the present term that the act of 1846 could not so operate. The legislature cannot open or reverse a judgment rendered according to existing laws. This is judicial power. And if they could authorize this to be done by bill of review, they could prescribe any other mode, and thus strip judgments of their solemnity. We cannot think that the legislature intended to give this act a retrospective operation. It was designed to change the law on that subject in cases thereafter to arise, and so far it can operate, and establishes a statutory rule. Nothing short of a direct declaration to that effect would justify the supposition that a retrospective operation was intended to be given to the law.

On this view of the case the remedy is not the proper one, and the demurrer to the bill was properly sustained.

Judgment affirmed.

ISAAC R. WADE ET AL. *vs.* JOHN B. THRASHER.

Where the makers of a note, payable, for value received, to the payee, pay a portion of the note to the assignee for value, of the payee, and execute a new note for the residue, payable to the payee of the first, who, by the contract of renewal, is to and does indorse it to the assignee, the payee, who is thus indorser on the second note, is not the *accommodation indorser* of the makers; the contract of renewal is a mere continuation of the previous liability, changed in nothing but amount; and when the payee has been compelled to take up the second note, the rights of the parties will stand as they would have stood, if the payee had taken up the original note instead of the new one.

Where the payee of a note executed to him for value, has procured its discount by a bank in this state, and, after its maturity, since the law of 1840, prohibiting assignments by banks of their evidences of debt, the payee on default of the makers, has paid the amount of the note to the bank, and re-

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ceived the note back again from the bank, the payee is remitted to his original rights against the makers of the note, and the law of 1840, referred to, has no application to the case.

Where the payee of a note, made to him for value, assigns it for value to a third person, and the makers fail to pay it at maturity, and the payee takes it up from his assignee, it is immaterial what the payee pays to the assignee to regain the note, he is restored to all his rights as against the makers, and can recover the full value of the note from them.

In error, from the circuit court of Jefferson county; Hon. Stanhope Posey, judge.

John B. Thrasher sued Isaac R. Wade, Walter Wade, Wilson W. Wade, and Lawrence Wade upon this note, viz.:

"$4,000. "*Port Gibson, Dec.* 2, 1839.

Twelve months after the 20th Dec. 1839, we, or either of us, promise to pay J. B. Thrasher, or order, for value received, four thousand dollars, negotiable and payable at the Bank of Port Gibson.

[Signed,] Isaac R. Wade,
Walter Wade,
Wilson Wade.
Lawrence Wade."

Indorsed,

"I waive demand and notice of demand and protest,
J. B. Thrasher."

The defendants pleaded, 1st. The general issue; 2d. *actio non*, because they say that said promissory note, after the making thereof, to wit, on the 2d day of December, 1839, became and was the property of the Bank of Port Gibson, and a part of the bills receivable of said bank, and so remained and continued until the 27th day of October, 1842. And said defendants aver, that upon the day and year last aforesaid, at the county aforesaid, the said Bank of Port Gibson transferred the said promissory note to the said plaintiff, contrary to the statute in such case made and provided; and this they are ready to verify, wherefore they pray judgment.

The replication to this plea was, that the Bank of Port Gibson did not assign or transfer said promissory note to the plain-

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tiff, contrary to the statute in such case made and provided, but that the plaintiff paid and took it up, as indorser thereof.

"*Actio non*, because they say that the said promissory note, &c. was made and executed by them the said defendants for the purpose of being discounted by the bank of Port Gibson, and that they procured the indorsement of said plaintiff thereon as their security, and for their accommodation, and in order to obtain the discount of the same by the said bank, and delivered the said promissory note with the indorsement thereon as their security to said Bank of Port Gibson, to wit, on 2d December, 1839, which said promissory note, after the making and indorsement and delivery, to wit, at &c. on &c. was dis-discounted by said Bank of Port Gibson, for the benefit and on account of them the said defendants, and truly then and there became and was the property of the said Bank of Port Gibson, and due and owing to and a part of the bills receivable of said bank, and so remained and continued until the 27th October, 1842, at &c. And the said defendants aver, that on the day and year aforesaid, at &c., the said plaintiff, as the security of them the said defendants, settled, satisfied, and took up the said promissory note by delivering and transferring to the said Bank of Port Gibson, so many shares of the capital stock of said bank as were then and there of the value of $400, and no more, in consideration thereof, and upon no other consideration whatever; and the said Bank of Port Gibson, on the day and year aforesaid, at &c., delivered the said promissory note to said plaintiff, and this they are ready to verify, whereupon they pray judgment."

The replication to this plea traversed all its allegations; and issues to the country were tendered and joined upon both replications.

On this state of pleading the case was submitted to the jury, who returned a verdict for $6,026.66, whereupon the defendants tendered a bill of exceptions, embodying the testimony and charges of the court as follows, to wit:

The plaintiff first read in evidence to the jury the pleading and note sued on, and then rested his case:

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When the defendants introduced James T. Mayre as a witness, who testified that he had been a director of the Bank of Port Gibson, and that the note sued on had been the property of that bank; that it had been discounted by the bank in renewal of a note of the same parties for the sum of $5,488.75, payable to the plaintiff, and which had been discounted by the bank for the plaintiff in part payment for stock taken by him in said bank, which note originally belonged to the plaintiff. This last mentioned note was then offered in evidence by defendants, as follows:

"$5,488.75. "*Oak Hill, Nov.* 29, 1838.

"Twelve months after the twentieth day of December next, we, or either of us, promise to pay to the order of John B. Thrasher five thousand four hundred and eighty-eight dollars seventy-five cents, for value received. Negotiable and payable at the Bank of Port Gibson.

ISAAC R. WADE,
WALTER WADE,
W. W. WADE.
LAWRENCE WADE."

Indorsed,

"I waive demand and notice of protest and demand,
J. B. THRASHER."

Mayre testified further, that he was present at the board of directors of the bank and a member when the note sued on was discounted. He could not say at whose instance; its proceeds were passed to credit of first drawee on the books of the bank; Wade at the same time paid the bank $1,808.75 in cash, which with the proceeds of the note sued on, took up the old note of $5,488.75; the old note was then checked out by Wade, and delivered to him.

It was the custom of the bank to pass proceeds of a discount to the credit of a party at whose instance it was discounted, but that this was an arbitrary rule of the bank without consulting either party. He does not recollect that anything was said at the board of directors at the time the note sued on was discounted, about requiring of plaintiff a guaranty, but as it was a

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rule of the bank never to release any security, he has no doubt that they required the indorsement of plaintiff upon the new note as a prerequisite to its being discounted at the renewal. The bank required the renewal of all the parties to the note, and an additional guaranty was given by the plaintiff in writing. The note sued on was taken up by plaintiff, who took up at the same time other notes, on which he was guarantor and indorser amounting, with the note sued on, to $12,220.78, for which he

gave the bank in specie	$2,000
Salary due him by the bank	1,600
Amount due him by the bank for services	2,500
	6,100
And 180 shares of stock, which had cost him originally $100 per share, making in stock	18,000
	$24,100

The guaranty by the plaintiff, in writing, of the note sued on, and seventeen other notes, was read to the jury.

The conclusion of this guaranty was in these words, viz.

"I, John B. Thrasher, who have indorsed and transferred the within and above described eighteen promissory notes to the Bank of Port Gibson, amounting to nineteen thousand five hundred and thirty-seven $\frac{63}{100}$ dollars, do hereby guarantee the payment of the same, together with all cost that shall accrue thereon after the parties before me on said notes shall have been prosecuted to insolvency; and in consideration that the said bank will not sue me in the first instance on said notes, I further waive any advantage which I might otherwise legally avail myself of under the consolidation loan of 1837, requiring plaintiffs to join drawers and indorsers of notes, bills, &c. in the same action, and hold myself bound as fully and effectually as if I were sued together and at the same time with the other parties to said notes.

[Signed] "J. B. Thrasher."

James J. Person deposed, that bank stock was worth $10 per share at the time the settlement was made with Thrasher.

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The plaintiff then introduced H. N. Spencer, who testified, that he was president of the Bank of Port Gibson, when both the notes were discounted. That the first note was the property of the plaintiff, and was discounted for him on his account and on his application. That the second note being the one sued on, was discounted in renewal of the first, and for the plaintiff; that the bank relied mainly on the liability of the plaintiff, and when all the parties applied for a renewal, the plaintiff was required to give the guaranty; that the bank always considered it plaintiff's debt; that he made all the arrangements. Witness, in this whole transaction, looked upon plaintiff as the party responsible, and conferred with him about the renewal; that the usage of the bank was to credit the first drawer, whether he was really entitled to proceeds or not. The understanding, when a note was discounted in renewal was, that no one could draw out the money, and the transfer of the proceeds to the credit of the one or the other, depended on the usage of the bank in keeping its books.

On cross-examination he stated, that he did know positively that the second note was discounted upon the application of the plaintiff; but did not know positively by whom the payment of $1,808.75 was made; that the bank would not have granted the renewal without the indorsement and guaranty of plaintiff.

The defendants admitted that there was a full and valuable consideration passing from the plaintiff to them for the note of $5,488.75 cents, in renewal of which, the note, on which the suit was pending, was given. The evidence here closed, and at the request of the plaintiff, the court charged the jury,

1. If the jury believe, from the evidence, that Thrasher was the owner of the original note, and indorsed it to the bank, and that the bank, on payment of a part, took the note sued on as a renewal of the liability of all the parties, as well indorsers as drawers, and on their joint application, and merely as a means of prolonging the day of payment, and that on the arrival of the second note at maturity, the drawers failed to pay it, and that on their failure it was paid and taken up by the plaintiff, then

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the plaintiff would be remitted to his title to the note as payee thereof, and entitled to recover the amount thereof with interest.

2. If they believe, from the evidence, that the plaintiff was the original owner of a promissory note made by defendants, payable to plaintiff for a good consideration, for a sum exceeding $5,000, which plaintiff got discounted by said Bank of Port Gibson,on his own account, and for his own accommodation on the faith of his indorsement thereof, and that said note of $4,000 was made by defendants payable to plaintiff to renew in part the original note, and that plaintiff indorsed said note of $4,000 to said Bank of Port Gibson, and has since paid and taken up said note, then the jury will find for the plaintiff the amount of said note of $4,000, with eight per cent. interest on the same from the maturity thereof.

3. If they believe, from the evidence, that the plaintiff was the original owner of said promissory note, and that the same was discounted by the Bank of Port Gibson on the indorsement and guaranty of plaintiff, and that plaintiff has since taken up said note, then he is restored to his original rights, and the jury will find for the plaintiff without regard to the amount paid by plaintiff to take up said note.

4. If the jury believe, from the evidence, that the plaintiff was the original owner of said note, and transferred or indorsed it to the Bank of Port Gibson, and that plaintiff has again become the owner of said note by taking up the same from said bank, then it matters not what plaintiff paid to said bank to take up said note, the plaintiff is restored to all his original rights, and the jury will find for the plaintiff the amount of the note and legal interest thereon from maturity.

5. If the jury believe, from the evidence, that the plaintiff was originally the owner of a note which he had discounted in the Bank of Port Gibson, and that said note sued on was given in renewal of said original note, and in like manner discounted in said bank on the indorsement of said plaintiff, and that said note has since been taken up by said plaintiff, — then the circumstances of discounting said note in said bank does not affect the consideration of the same, and the jury will find for the

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plaintiff, without regard to the value of Port Gibson money, the amount of the note and interest.

The defendants then requested the court to give the following instructions, to wit:

1. That if the jury believe from the evidence, that the note of $5,488.75 was renewed to the Bank of Port Gibson by the makers, by their paying to the bank $1,808.75 in cash, and giving a new note for $4,000, then the transaction becomes a new one between them and the bank, and the indorsement of the new note by the plaintiff placed him only in the attitude of a security or accommodation indorser.

2. If the jury believe, from the evidence, that the plaintiff was only a surety or an accommodation indorser of the note sued on, then he is only entitled to recover the amount which he actually paid to the bank for said note, with interest from the time he paid it.

3. If the jury believe, from the evidence, that the plaintiff was only accommodation indorser or surety on said note sued on, then his taking up said note does not give him a right of action upon the note, and the jury must in this action find for the defendants.

4. If the jury believe from the evidence, that the plaintiff was only an accommodation indorser of the note sued on, his attitude as such is not changed by his execution of the guaranty to the bank.

Of which charges asked by defendants the court refused to give the first and third, but gave the second and fourth.

The defendants prosecute this writ of error.

H. T. Ellett, for plaintiffs in error.

1. There was conflicting proof upon the point, whether Thrasher was or was not an accommodation indorser on said note for the makers, they insisting that he was an accommodation indorser, and he contending that he was not. In view of this proof, the defendant's third instruction should have been given.

2. If Thrasher was a surety, he was only entitled to recover

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the amount paid by him for his principals. *Bonney* v. *Seeley*, 2 Wend. 481. But he could not maintain an action on the note itself. The proper form of action to enforce this implied promise, is the action of *indebitatus assumpsit* for money paid. *Powell* v. *Smith*, 8 Johns. 249; Chitty on Bills, (568,) (648); 1 Leigh's Nisi Prius, 71, 485.

J. B. Thrasher, in proper person.

1. Nothing but the charges having been excepted to, no question can be made but upon them. *Wilson* v. *Owens*, 1 How. (Mi.) R. 126.

2. The proofs sustained the issues; and the charges asked were properly rejected, because they asked presumptions to be drawn in the face of the proof. They were, therefore, abstract, having no relation to the evidence. 11 Wheat. R. 59; 4 How. (Mi.) R. 386.

3. It was wholly immaterial what was paid by the indorser to the bank; it could not affect the former's rights against the maker. *Turner* v. *Brown*, 3 S. & M. 438; 6 Cow. 484.

4. The law of 1840, prohibiting banks from assigning their notes, could not constitutionally affect Thrasher's right to take up the note he had indorsed the bank; that right was, under the existing law, part of his contract of indorsement, and no subsequent legislation could take it from him. *McCracken* v. *Hayward*, 2 How. S. C. R. 612.

5. But it has been expressly decided, that the law of 1840 has no application to a case of this kind. *Maury* v. *Jeffers*, 4 S. & M. 87; so, also, *Terry* v. *Woods*, 6 S. & M. 150; Bailey on Bills, 142.

6. Even if Thrasher were accommodation indorser, he had a right, if he paid the note, to sue upon it directly. 3 Kent Comm. 86; *Church* v. *Barlow*, 9 Pick. R. 550.

James H. Maury, on the same side.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This suit was brought by defendant in error, as payee of a promissory note for $4,000, made by plaintiffs in error.

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Two special pleas were filed; first, that on the 2d day of December, 1839, the note sued on became the property of the Bank of Port Gibson, and was afterwards assigned and transferred to the plaintiff below, contrary to law; and second, that the note was executed by defendants below, for the purpose of having it discounted in bank, and that they procured the indorsement of plaintiff for their accommodation. That the note was discounted and became the property of the bank, and that on the 27th of October, 1842, plaintiff took up the note by a transfer of certain shares of the capital stock, worth only $400. To these pleas issues were taken, and, on the trial, the defendants excepted to certain charges given to the jury for the plaintiff, and, also, because the court refused to give certain others asked by defendants, and a verdict was rendered for the plaintiff, for the amount of the note and interest.

The bill of exceptions discloses this state of facts. The plaintiff held a note made by the defendants for $5,488, given for a full consideration, which was made payable and negotiable in the Bank of Port Gibson. By indorsing this note, he procured it to be discounted in the bank, for his benefit. When this note matured, the makers paid a sufficient amount to reduce the sum due to $4000, and for that sum gave the note sued on as a renewal of the former note, payable as was the original, to the plaintiff, who again indorsed it, and it was discounted. The proceeds, according to the custom of the bank, were placed to the credit of the first maker, who gave a check for the amount, which was applied to the payment of the original note, which was given up. The makers failing to pay the second note, the plaintiff, as indorser, took it up, and has brought this suit on it. When the first note was discounted, plaintiff promised to give a separate guaranty for its payment, which he afterwards did, and made the payment of this and other notes indorsed by him, part in cash, and part in stock. The president of the bank was examined, who, in addition to the foregoing facts, stated, that the first note was discounted at the instance of the plaintiff, but as to the second, he was not certain whether it was or not, but a special guaranty was required of him, as a condition on

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which the new note was taken. That the plaintiff made all the arrangements in transacting the business, and was looked to as the responsible person throughout; that it was considered as his debt.

It will be sufficient to consider of the law, as applicable to these facts, without special reference to the several charges. The plaintiff was evidently not an accommodation indorser. The contrary appears from all the proof. The renewal was but a part of the original transaction. A mere continuation of the previous liability, changed in nothing except in amount. The debt was diminished by the payment, but the character of the transaction was not changed. *Union Bank of Tennessee* v. *Govan*, (*ante* 333,) decided at the present term. The bank was particularly careful in not changing the liability of the parties. Their respective rights then must be determined as on a note passed in the course of trade. They stand as they would have stood, if plaintiff had taken up the original note instead of the new one.

If we are right then, in considering the case in that light, it is impossible to distinguish it from the case of *Maury* v. *Jeffers*, 4 S. & M. 87. Or if there is a distinction, it does not operate favorably to the defendants. That was a case in which the indorser, who was the payee, of a business note, had negotiated it in bank, but in consequence of the maker failing to pay, was compelled to take it up. To an action brought on it, payment was pleaded, and proof made that while the note was owned by the bank, the maker held its notes to the amount due; which notes were filed in court as an offset. We decided that this did not constitute an offset; that the agreement of the indorser was to pay the note if the maker did not, and when he did pay, on the failure of the maker, his contract of indorsement was virtually rescinded, and he was restored to his original rights. In the case of *Terrey* v. *Woods*, 6 S. & M. 139, we held that "the indorsement to the bank was a new, distinct and independent contract. The payment (by the indorser) to the bank was not a discharge of the bill, but of the indorsement."

This is the case with regard to all business indorsements. The indorser becomes liable on his own contract, and it is a

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separate and distinct liability from that of the maker, who has no concern with the contract of the indorser. The indorser undertakes upon condition, and if the condition fails, he becomes liable. The maker's promise is absolute. He may pay the holder, but if he neglects until the indorser is called on to perform, the maker of course loses his privilege. The indorser is restored to all his rights. It is like the sale of a piece of property, which the vendor is compelled by his contract to take back. When he does so, the price by which he discharged his contract, is no criterion as between him and *his* vendor.

In the case of *Turner* v. *Brown*, 3 S. & M. 425, we held that it was immaterial what the assignee pays for a note. Such consideration does not regulate the liability of the maker, who is bound by a special contract to pay so much money. To the same point, see *Murray & Murray* v. *Judah*, 6 Cow. 484.

From the foregoing view, it is manifest that the law prohibiting banks from transferring their securities, can have no application in a case like the present.

The decisions of the court in giving and refusing the charges, was in strict accordance with the law of the case, and the judgment must be affirmed.

ROBERT COOK *vs.* HUGH H. FULTZ.

The statute (How. & Hutch. 525, § 76,) which directs the mode of procedure upon the sale by decree of the chancery court, of mortgaged premises, provides, that *bond* with surety shall be taken from the purchaser, which if not paid at maturity, is to have the force and effect of a judgment, and execution may issue upon it; a decree, therefore, which directs, that on the sale of the mortgaged property, a *note* shall be taken for the purchase-money due the complainant, and if there be any surplus, a *note* for that surplus shall be taken, payable to the defendant, is erroneous, and, before a sale under the decree, will, on the appeal of the defendant, be reversed.

ON appeal from the decree of the vice-chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

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Cook v. Fultz.

Robert Cook bought a tract of land of James Torrey, and took a deed of conveyance, and gave his note for the purchase-money. He joined in the execution of the indenture, by which he agreed, that the land should remain bound for the purchase-money. Torrey assigned the note to Fultz, who filed his bill in the vice-chancery court, seeking to subject the land to the payment of the note. A decree was rendered for complainant, by which, in substance, the commissioner appointed to make sale of the land, is directed to take a note from the purchaser with good security, payable to the complainant; and if the land should sell for more than the amount due to complainant, to take a note for the excess payable to Cook, the defendant.

William G. Thompson, for appellant.

The decree should have been, that the commissioner take from the purchaser a bond with good security, payable to Cook for the excess of the purchase-money, over and above the amount due to complainant. Cook would be entitled equally with complainant, to the summary remedy given by statute on the non-payment of the purchase-money. The statute does not authorize the issuing of an execution on a note given for the purchase-money. How. & Hutch. 525, § 76.

William Thompson, on the same side.

Brooke, for Appellee.

The deed from Torrey to Cook expressly reserves a lien for the purchase-money. This is a lien created by express acts of the parties, and as such, is assignable. See *Barker et al.* v. *Planters' Bank*, 5 How. (Mi.) R. 571; Meigs's R. 52; 9 Wend. 209.

Mr. Justice Thacher delivered the opinion of the court.

The appellant purchased a tract of land of Torrey. He united in the conveyance, and therein covenanted that the land should remain bound for the purchase-money. The promissory note which the appellant gave to Torrey to secure the payment

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of the purchase, was by him assigned to Fultz, who files his bill to subject the land to the payment of the promissory note.

The decree of the vice-chancellor is objected to. It is as follows: "That the commissioner shall sell the land to the highest bidder on a credit of six months, unless the money is paid in twenty days, taking from the purchaser a note with good security payable to Fultz, with interest at the rate of eight per cent. per annum from the date of the decree, if the land sell for the amount of the decree or any less sum; and if the land sell for more than the amount of the decree, said commissioner shall take a note for such surplus, payable to said appellant, — said notes, if not paid at maturity, to have the force and effect of judgments." No sale has been had under that decree. The objection to the decree is, that the statute H. & H. 525, § 76, does not authorize the issuance of an execution upon a *note* given for the payment of purchase-money, but only upon a *bond* so given. To this objection, it must be said, that such sales are regulated by statute, and the duty of the commissioner pointed out, as claimed by the appellant. The mode established by the statute should be observed, to entitle a party to its benefits and privileges.

The decree must be reversed, and a decree made in this court in compliance with the rule of the statute in such cases.

Henry O'Brien *vs.* John Liddell et al.

A judgment-debtor is subject to the proceeding by garnishment at the suit of a judgment-creditor of his own judgment-creditor.

The first and fourth sections of the act of 1842, (Sheet Acts, p. 140,) in relation to the practice in writs of garnishment, embrace all debtors as wel as the debtors of banks; the second and third sections apply exclusively to bank debtors.

A garnishee summons against a defendant residing in a different county from that in which the judgment on which it issues is rendered, is, under the act of 1842, p. 140, properly returnable to the circuit court of the county where the garnishee resides.

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O'Brien v. Liddell et al.

Where the answer of a garnishee is contested, the statute (How. & Hutch. 558, § 12,) authorizes a trial by jury, and dispenses with the formality of pleading. If a party summoned as garnishee answer denying his indebtedness, but does not move for his discharge, he is in court until the final disposition of the case, subject to have his answer contested; and where his answer has been contested, and a judgment rendered against him, and he moves for a new trial, his belief that he had been discharged on his answer will not excuse his neglect in preparing for the issue.

Where a judgment-debtor is garnisheed as a debtor of his judgment-creditor, and the fact of indebtedness is in issue, the judgment against the garnishee makes out a *prima facie* case against him, and if he has discharged it he must show it.

In error from the circuit court of Adams county; Hon. Stanhope Posey, judge.

On the 14th of July, 1845, a writ of garnishment was issued from the office of the clerk of the circuit court of *Franklin* county, reciting that on the 8th day of November, 1843, John Liddell & Co. recovered of William Vannerson a judgment for $366.84, and that suggestion had been made that Henry O'Brien, Frederick B. Earnest, John R. Stockman, and Daniel Abbott, of Adams county, were indebted to said William Vannerson, and affidavit having been filed that Vannerson has no visible property upon which a levy could be made, the sheriff of *Adams* county was commanded to summon said O'Brien and the others alleged to be indebted, to appear before the circuit court of the county of *Adams*, on the first Monday in November thereafter, to answer, &c. This summons was served on the 23d of July, 1845. On the 30th of September, 1845, the clerk of the circuit court of Franklin issued another like summons against William L. Jones, M. W. Dickeson, Philip S. Schuyler, Robert W. Wood and others, on the same judgment, returnable to the circuit court of Adams county, at the November term, 1845, which was executed on Dickeson, Wood, Jones and Young, and returned not found as to the others. There was no term of the court in November, 1845. At the May term, 1846, the cause was continued by the plaintiff in the garnishment; at this term O'Brien filed his answer, denying all indebtedness, &c., which was sworn to on the 22d day of November, 1845.

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At the November term, 1846, the record recites that "the said John Liddell, plaintiff in said writ of garnishment, for replication to the answers made by the said defendants, and the allegations therein contained and set forth, says they are not correct and true, but that said defendants are indebted to the said William Vannerson, and he prays that the same may be inquired of by the country," &c. At the same term an order was entered stating that the "said parties came by attorneys, and the said garnishees moved to dismiss this cause, because the garnishment issued from a judgment in the county of Franklin, returnable to the circuit court of Adams county." The court overruled the motion.

At the May term, 1847, the plaintiff appeared by attorney, and dismissed said suit as to garnishees William L. Jones, Robert W. Wood, and James Young, on their answers, and obtained judgment against Dickeson for want of answer, for the sum of $411.13, against Abbott, according to his answer, for the sum of $40, and the order proceeds thus: "And the said plaintiff and the said garnishee, Henry O'Brien, by attorneys, came, and a jury being called, (naming twelve,) who being duly impanelled and sworn the issue joined to try upon their oaths, do say, we, the jury, find that the said garnishee, Henry O'Brien, does owe, and is indebted to the said defendant, William Vannerson, in the sum of $411.13." On which finding the court rendered a judgment against O'Brien accordingly; and also a judgment against said Dickeson, for $411.13; and against said Abbott for $40. A *remittitur* was entered for excessive verdict of $25.50; and judgments for costs were also rendered against the garnishees.

Afterwards, at the same term, O'Brien moved for a new trial, on the grounds set forth in the affidavit, "because the court had no jurisdiction of the case; because there was no issue made up to be tried, nor evidence on which the verdict could be sustained." The motion was overruled, and a bill of exceptions taken, which contains all the evidence adduced in the trial of the case, as also the affidavit of the plaintiff in error, as the grounds of his motion. This affidavit states that he had within

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the last two days learned that a judgment had been rendered against him in this case; that he was taken by surprise, and had since employed counsel to investigate the matter. He states that no step was taken by the plaintiff in the case against him, so far as he knew, until the judgment. He believed his answer was a discharge, and never knew it was contested; no issue was made traversing his answer, nor had he ever any knowledge that any allegation had been filed, or suggestions made, that he had not discovered the true account of debts due from him to said Vannerson.

The bill of exceptions states that on the hearing of the motion it was shown to the court that the only evidence before the jury on the trial of the case of the plaintiff against the defendant O'Brien was, "a judgment of the circuit court of Adams county, in the case of William Vannerson against Henry O'Brien, for the sum of three hundred and forty-four dollars, besides costs, rendered on the 10th day of June, in the year of our Lord one thousand eight hundred and forty-five."

This writ of error is prosecuted by O'Brien.

Sanders and *Haggin*, for plaintiff in error, insisted,

1. That under the act of the legislature regulating the writ of garnishment, the answer of O'Brien amounted to a discharge unless the suggestion was made in obedience to the statute, that O'Brien had not disclosed the true account of his indebtedness, and an issue to try whether a true account had been disclosed, made up. This has not been done. The issue presented by the plaintiff in the garnishment was not the one contemplated by the statute. How. & Hutch. 549, 557, 558.

2. That the bill of exceptions showed that O'Brien had been found indebted on a judgment; and that judgment-debtors could not be garnisheed.

3. That the circuit court of Adams county had no jurisdiction of the writ; it should have been returned to the circuit court of Franklin. On this point the counsel argued that the whole act of February 25, 1842, to regulate the practice and proceedings in suits against garnishees, had relation alone to bank debtors,

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and not to ordinary cases of indebtedness. That a contrary construction would be oppressive in the extreme, and ought not to be indulged in behalf of so extraordinary a remedy.

4. There was no legal issue; the verdict was therefore a nullity, and no judgment could be entered on it.

Reed, for defendant in error, replied,

1. That the statute of 1842 expressly directed the writ of garnishment to be returned to the county where the garnishee resided.

2. That it had already been decided that a judgment-debtor could be garnisheed. *Gray* v. *Henby*, 1 S. & M. 598.

3. The affidavit of O'Brien showed no diligence; on the contrary, great want of it; without diligence he could not seek favor. *Thompson* v. *Williams*, 7 S. & M. 270.

4. Even if the issue made on O'Brien's answer be technically insufficient, it is cured by the statute of jeofails.

Mr. Justice CLAYTON delivered the opinion of the court.

The points presented by the record may be disposed of in few words.

It has already been decided, that a judgment-debtor, is subject to the proceeding by garnishment. *Gray* v. *Henby*, 1 S. & M. 598.

In regard to the construction of the act of 1842, p. 140, in reference to the practice in writs of garnishment, we think the first and fourth sections are general, and embrace all debtors, as well as the debtors of banks. The second and third sections apply exclusively to bank debtors, but there is nothing to require the same restricted construction as to the others.

The statute (How. & Hutch. 558, § 42,) authorizes a trial by jury, when the answer is contested, and dispenses *with the formality of pleading*. The party should have moved for his discharge upon the filing of his answer, and as he failed to do so, he was still in court till the final disposition of the case.

The judgment in favor of Vannerson against O'Brien, was legal evidence on the trial before the jury, and made a *prima*

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facie case against O'Brien. If he had discharged it, it was his duty to show it.

There seems to have been much negligence on the part of O'Brien in the management of the case below, and injustice may possibly have been done him; but no legal ground is shown for the reversal.

Judgment affirmed.

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JAMES BONNER ET AL. *vs.* CYRUS MARSH ET AL.

Where goods are shipped on board of a steamboat, and a bill of lading taken by the shipper, and delivered to the boat for the consignee, the title to the goods is not thereby necessarily vested in the consignee absolutely; it depends on the intention of the parties; if made for the purpose of passing title, the delivery of the bill of lading will have that effect; if there be no contract of purchase between consignor and consignee or other party, the owner's title will not be divested.

When goods are consigned by one to another, there is a difference between the right to the goods and the right to the proceeds; there is no change of property in the latter case; where the consignee is merely interested in the proceeds, the right remains in the consignor.

There are cases in which the consignee will, for a preëxisting debt, be allowed to retain in preference to other creditors out of the goods consigned, when they have come *into his actual possession;* but until the goods are in his actual possession, (a constructive possession will not do,) the consignee, though a creditor, has no interest in the goods beyond his commissions, and can assert no right to have satisfaction of his debt out of the consigned goods; and if they are seized by an attaching creditor of the consignor before they reach the consignee, the latter has no longer any right to or interest in them.

M. being a resident of Louisiana, on the Mississippi River, and in debt to B., a commission merchant of New Orleans, shipped to B., by steamboat, eleven bales of cotton, took a bill of lading for them and delivered it to the boat for B.; the cotton being shipped by M. to B. to sell, and out of the proceeds B.'s account was to be paid, and any other account or note M. might owe B., or bill, he might draw on B. against the cotton; while the boat was on the voyage to New Orleans with the cotton it stopped at Natchez, in the state of Mississippi, where P., a creditor of M., attached the cotton thus shipped to

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B.; the latter claimed the cotton, and on an issue to try the right of property, *held*, that under the facts the cotton was M.'s when attached, and was subject to the attaching creditor in this state.

In error from the circuit court of Adams county; Hon. Stanhope Posey, judge.

On the 15th of April, 1846, Cyrus Marsh and Benadam Pendleton sued out an attachment against Conrad F. McRea, returnable to the Adams circuit court; the sheriff levied on eleven bales of cotton. At the November term, 1846, James Bonner and Joseph B. Gribble, partners, under the style of Bonner & Co., interpleaded and claimed the eleven bales as theirs at the date of the levy. An issue was made up to try the right, which resulted in a verdict against the right of the claimants. From the bill of exceptions it appears, that the following facts were admitted on the trial, viz.: "That Conrad F. McRea, of the parish of Concordia, state of Louisiana, was, on the 17th day of March, A. D. 1846, indebted for advances to James Bonner & Co. of New Orleans, in the sum of $447.02; that the eleven bales of cotton in controversy belonged to C. F. McRea prior to, and at the time of their shipment, and were, by his direction, shipped on the 14th day of April, 1846, by C. R. Stewart, on board the steamboat called the Paul Jones, at Rifle Point, in Louisiana, to J. Bonner & Co. at New Orleans, for which the bill of lading was given and forwarded to Bonner & Co. on the boat; that while the cotton was on board the boat, on her then passage from Rifle Point to New Orleans, said boat touched at the port of Natchez, in Mississippi, where the said cotton was levied upon by said attachment; that said eleven bales of cotton were shipped to J. Bonner & Co. to sell, to pay them said account, and any other account or note that McRea might owe, or any bill he might draw against said cotton; and that the said cotton was taken by virtue of the attachment, and never was delivered to J. Bonner & Co. under the bill of lading."

The counsel for Bonner & Co. requested the court to charge the jury:

1. That if they believe from the testimony that C. F. McRea was at the time of the shipment of the cotton in controversy

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indebted to J. Bonner & Co., and shipped the cotton from Rifle Point, in Louisiana, to them at New Orleans, to pay them such debt, and forwarded to them the bill of lading, then the legal right of property was vested in them at the time of the delivery to the boat, and the cotton was not subject to seizure by attachment while *in transitu*.

2. That if they believe that the cotton was shipped to Bonner & Co. to pay a debt due from McRea to Bonner & Co., and a bill of lading was forwarded to Bonner & Co. at the time of the shipment, the cotton is not subject to the attachment in this case so as to deprive Bonner & Co. of their claim upon the cotton for the debt due them by McRea.

These instructions were refused, and this writ of error sued out.

J. B. Maxwell, for plaintiffs in error,

Contended at length that by virtue of the shipment of the cotton and the delivery of the bill of lading, the legal property in the cotton was vested in Bonner & Co. at the date of the shipment, and consequently was not liable to be attached as the property of McRea. He cited and commented on *Stevenson* v. *Pemberton*, 1 Dall. 4; *Wood* v. *Roach*, 1 Yeates, 177; S. C. 4 Dall. 180; 1 Term Rep. 209; 1 Strange, 165; 4 Burr. 2238; *Davies* v. *Peck*, 8 Term 330; *Griffin* v. *Langfield*, 3 Camp. 254; 1 Lord Raym. 271; 2 Term Rep. 63; 1 H. Black. 357; 6 East, 21; *Wright* v. *Campbell*, 4 Burr. 2046; *Wiseman* v. *Vanderpelt*, 2 Ves. 203; *Caldwell* v. *Bale*, 1 Term Rep. 205; *Hebbert* v. *Carter*, Ibid. 745; *Lickbarrow* v. *Mason*, 2 Term R. 63; *Walter* v. *Ross et al.* 2 Wash. C. C. Rep. 288; *Knight* v. *Wilcox*, Ambler, 252; 3 Kent's Com. 541; *Kinlock* v. *Craig*, 3 Term Rep. 787; Civ. Cod. of Lou. Art. 3194–3196; *Davis* v. *Brooks*, MS. Op. S. C. of Lou.

J. Winchester, on same side,

Relied on same points and authorities; but contended in addition, that goods shipped on a steamboat *in transitu* on the Mississippi river, touching at a port in this state, were not liable to our attachment laws; to hold them so would be against the

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policy of the law, would tend to drive boats from landing at our ports, and would often involve the officer levying the attachment in ruinous risks.

J. A. Vanhoesen, for defendants in error,

Insisted that the shipment of the cotton and the delivery of the bill of lading to the boat, did not vest the absolute title to the cotton in Bonner & Co.; that there was no evidence that the cotton was *sold* to Bonner & Co., and without that, the mere shipment and delivery of the bill of lading did not change the *title;* it was still in McRea; that the doctrine of stoppage *in transitu* had nothing to do with this case; it was a question of title here. He cited and commented on *Lickbarrow* v. *Mason*, 1 H. Bl. 357; 2 Kent, 541; 6 East, 33, 41; 8 Cranch, 420; Wash. C. C. Rep. 283; Abb. on Ship. 374; Theobald on Prin. and Ag. 410; 2 Kent's Com. 467, 636; *Kinlock* v. *Craig*, 3 Term R. 119, 783; 2 Wash. C. C. Rep. 289; Petersd. Abrid. 198; 2 Dana's Dig. 263; 3 Lou. Rep. 301; 1 Dall. 3; Story on Bail. 210; Ship Packet, S. P. Parker, Master, 3 Mason, C. C. Rep. 338, 339; *Newson* v. *Thornton*, 6 East, 37; 3 Lou. Rep. 562; Story Bail. 370.

Montgomery and *Boyd*, on same side.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Marsh & Pendleton sued out an attachment against C. F. McRea, which was levied on eleven bales of cotton. The plaintiffs in error interposed their claim to the cotton under the following circumstances. McRea, of the parish of Concordia, Louisiana, was, on the 17th of March, 1846, indebted to Bonner & Co., of New Orleans, in the sum of $447, for cash advances. On the 14th of April, 1846, the cotton was shipped by McRea through his agent, at Rifle Point, in said parish, on the steamboat Paul Jones, to Bonner & Co.; a bill of lading was taken and forwarded by the boat. The cotton was attached at Natchez, where the boat touched on her downward passage. The cotton was shipped to Bonner & Co. to sell, and out of the

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proceeds their account was to be paid, and also any other account or note that McRea might owe them, or any bill he might draw against it.

The claimants' right has been discussed, as though it could only be defeated on the doctrine of the right of stoppage *in transitu*, which, it is said, was peculiar to the vendor. This doctrine is not involved. It is an equitable right which the vendor has, who has sold a chattel on a credit, to be exercised in case of the insolvency of the vendee before delivery. It presupposes an absolute sale, by which the right of property is vested in the vendee. If this were a case in which McRea had nothing more than the right of stoppage *in transitu*, the claimants must succeed, because that is to admit their title to the thing, subject to McRea's equitable lien for the price.

But the true and only question here is the question of title; was it the property of McRea when the attachment was levied, or of Bonner & Co.? In other words, had there been a sale and delivery? It is not pretended that there was any contract for the cotton, other than that which the law may imply from the circumstances. The question of ownership seems to lie in a narrow compass. It is determined by the true answer to a single interrogatory. Was the debt of McRea to Bonner & Co. paid by the shipment of the cotton?

The delivery of the bill of lading on board of the boat for Bonner & Co. is relied on as sufficient to pass title. In connection with an actual sale, a symbolical delivery is sufficient. The sale of goods at sea may be made by a transfer of the bill of lading by the factor; but in such cases it is assigned for the purpose of passing title.

In cases like the present, it is necessary to bear in mind the origin of the transaction, as by that the rights of parties must be determined. There must be a contract of purchase, either direct or by necessary inference; or if not, the owner's title is not divested. There are cases in which, for a preëxisting debt, the consignee will be allowed to retain in preference to other creditors, when the thing consigned has come into actual possession.

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The delivery of goods, says Chancellor Kent, to a servant or agent of the purchaser, or to a carrier or master of a vessel, when they are to be sent by a carrier, or by water, is equivalent to a delivery to the purchaser; and the property with the correspondent risk, immediately vests in the purchaser, subject to the vendor's right of stoppage *in transitu*. 2 Kent, 499. This doctrine does not apply in all cases where goods are shipped by one man to another. It is rather a question of delivery, which consummates a previous purchase. The remarks are made in view of a preceding contract.

Again he says, "the effect of a consignment of goods by bill of lading, is to vest the property in the consignee. A delivery to any general carrier, where there are no specific directions out of the ordinary usage, is constructive delivery to the vendee." These remarks evidently presuppose a previous contract. This is manifest from the remarks which follow. "But if there be no particular mode of carriage specified, and no particular course of dealing between the parties, the property and the risk remain with the vendor while in the hands of the common carrier. The delivery to the agent must be so perfect as to create a responsibility on the part of the agent to the buyer." "Until the party receiving a consignment or remittance, made on account of the consignor, has done some act recognizing the appropriation of it to a particular specified purpose, and the party claiming under the appropriation has signified his acceptance of it, so as to create a privity, the property and its proceeds remain at the risk and on the account of the remitter or owner."

This seems to be a correct summary of the principles established by adjudged cases; but this further principle is to be kept in view; there is a difference between the right to the thing, and the right to the proceeds when goods are consigned by one to another. In the latter case there is no change of property.

The books are full of cases on this subject, and, as the question is said to be important, it demands a critical examination on authorities cited. *Caldwell* v. *Ball*, 1 Term R. 205, 206, is

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a leading case. The controversy arose on two bills of lading for the same goods. One had been assigned by the agent of the shipper to the plaintiff. The shipper, or consignor had assigned the other. It was admitted that other assignment would pass title; but it is to be observed that the assignments were made for that purpose. The sugar was on ship-board, and could not be otherwise transferred. The title derived by the assignment of the owner was preferred, and, if it proves anything which has a bearing on the question, it is, that the owner's right is not divested by the act of shipping to another.

The case of *Wright & Rathbone* v. *Campbell & Hays*, 4 Burr. 2046, establishes the principle, that a factor to sell goods, who has secured an assignment of the bill of lading, may make a valid sale while the goods are at sea. This cannot be doubted. He acts but as agent for the principal, and to recognize his right to do so, is to recognize the same right in the principal. That Bonner & Co., as factors, could have sold this cotton before its arrival, is true; but that does not prove that the right of property was in them.

The case of *Hibbert* v. *Carter*, 1 Term R. 746, establishes the principle, that the transfer of a bill of lading to a creditor, *prima facie* conveys the whole property in the goods from the time of its delivery; but it also decides, that if the parties only intended to bind the proceeds, the right of property in the thing is not divested. And it was also said, in this case, that the transfer of the bill of lading will operate as a payment *pro tanto*. It cannot be pretended, that this mere shipment of cotton was a payment.

In *Stevenson* v. *Pemberton*, 1 Dallas, 3, it was decided, that when goods had been shipped to a consignee to pay a previous debt, and had *actually come into his possession*, he would be entitled to the proceeds in discharge of his debt. That is like the present case, except in regard to possession, and that constitutes a very material difference.

Lickbarrow v. *Mason*, 2 Term R. 63, is also a leading case. But it differs very widely from this case. F. had ordered goods to be shipped on his account by T., which was done, and

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four bills of lading taken, which made the goods deliverable to the shipper or order. Two of the bills were assigned and forwarded to F., with an invoice of the goods, and bills of exchange for the amount drawn by T., which were accepted. F. sent the bills of lading and invoice to the plaintiff, and also drew bills, which the plaintiff paid. Before the first bills drawn by T. on F. became due, F. became a bankrupt, and T. was obliged to take up the bills, and, thereupon, indorsed the bill of lading to defendant, who presented it to the captain and received the goods. On demurrer to the evidence, the plaintiff was held to be entitled to recover. But the reason is plain enough. F. had ordered the goods; here was a contract, which was consummated by the assignment, and the receipt of the bill of lading. F. then had a right to dispose of the goods, which he did do to the plaintiff, who was an innocent person. The goods were sold while at sea, by delivery of the bill of lading. The original consignor had parted with his title, not by a mere voluntary shipment, but by filling an order. And not only had he parted with title, but his right of stoppage *in transitu* was lost when the goods went into the hands of a third person. Buller, justice, in delivering his opinion, stated, that as between vendor and vendee, the property is not altered until delivery of the goods.

The whole doctrine on this subject was very fully considered in *Walter* v. *Ross*, 2 Wash. C. C. R. 283, in which all the cases are reviewed. It bears a more exact resemblance to the case at bar, than any that has been found. Judge Washington said the cases in the books were of two classes. 1st. Where the goods were shipped by order of the consignee, and for his account and at his risk; or, 2d, without orders, and for account and at the risk of the shippers. The first class of cases is founded upon contracts of sale; and the second are all cases of principal and agent or factor. As to the latter class, it was said, if the factor has not sold the goods, it is impossible that any question can ever arise between him and his principal, respecting the right of the latter to reclaim the property at any time before a *bona fide* sale. "The factor has no property or interest in the goods beyond his commissions, and of course cannot controvert the right

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of his principal. If, indeed, he be a creditor of the shipper, he has a contingent interest in virtue of his right of lien, which the possession would give; but for the perfection of this right, he must acquire and retain an actual possession of this property; a constructive possession will not do."

On these principles, the case is clearly against the claimants. They were not purchasers, but factors merely, who were creditors of the shipper. The cotton was shipped to them to sell to pay their account, and any other account, note or bill which might be drawn on the cotton. At most they had but a lien on the proceeds of the cotton after sale, to the amount of their account. A factor has a qualified right of property, but it is only such right as enables him to protect the interest of his principal. He has no right adverse to that of his principal. And whatever right they had, depended on actual possession, which they never acquired.

The manuscript case from the supreme court of Louisiana, was different in its circumstances. The produce had been placed on ship-board, the bills of lading mailed, *and bills drawn on the identical shipment.* The case was placed on the ground of an actual sale, consummated by symbolical delivery. It was like the case of *Lickbarrow* v. *Mason.*

The doctrine is broadly laid down in Abbott on Shipping, (by Story and Perkins,) 410, and may seem to militate against the foregoing view; but the case of *Haille* v. *Smith,* 1 Bos. & Pul. 563, cited in support of the text, does not go so far. It is in strict accordance with what has been said. The case turned on a special contract to ship *specific goods* to one house for the benefit of another, and it was not only placed on the ground of the specific agreement, but it was held to have raised a trust for the benefit of the third house.

It is also said, in the authority last cited, that where goods are shipped to a factor, and bills of lading transmitted, making them deliverable to him, upon proof of the intention of the principal to vest the property in the factor, as a security for antecedent advances, the factor may acquire a special property in the goods the moment they are delivered. That is doubtless true.

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But that is but a special property, and it is subservient to the absolute or paramount right of the principal, and it is, therefore, subject to the rights of attaching creditors before delivery.

Judgment affirmed.

WALTER GOODMAN ET AL *vs.* L. P. C. BURFORD.

B. purchased a slave of W. in February, 1843, and gave W. $350 for him, and agreed to permit W. to redeem the slave either in September or November following, by paying $400: W. failed to redeem at the time and B. gave him $150 dollars more and took a bill of sale from W. at which time B. gave W. also the privilege of redeeming the slave if he could sell him for more money; W. on the same day sold the slave for $25 more to L. B.; and B. gave W. the bill of sale he had received; and L. B. paid the money in part to B. and part to W. who paid the rest to B., and W. gave L. B. a bill of sale of the slave; G. obtained judgment against W. after the time limited for redeeming and before the payment by B. to W. of the one hundred and fifty dollars on the sale to L. B.; W. up to the time of sale to L. B. had retained possession of the slave; G. levied an execution on his judgment on the slave in the hands of L. B. which the latter enjoined: *Held* by a majority of the court, that the title to the slave was vested in B. by the sale of February, 1843, and that his permission to W. to redeem was merely *ex gratia;* and his payment of the $150, a gratuity; and the formalities observed respecting the return of the bill of sale and the execution of the bill of sale by W. to B. amounted to nothing in a case of bargain, sale and delivery of personal property.

Held, also, that even if the agreement to redeem had formed a part of the contract of first purchase, and had actually existed even up to the date of G.'s judgment, the lien of the judgment existed only upon the mere contingency or privilege which W. failed to avail himself of; and that the injunction against the judgment at law was properly perpetuated.

Mr. Justice Clayton dissented from these views, and *held* that the first sale to B. was a sale with liberty to repurchase on a given day; the judgment of G. obtained before that day bound the equitable right of W. to redeem the slave in the hands of B; and was a lien on the slave, to be enforced in equity to that extent: as that value was estimated at one hundred and fifty dollars the injunction should have been dissolved to that extent.

ON appeal from the circuit court of De Soto county; Hon. James M. Howry, judge.

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L. P. C. Burford charges, in his bill, that an execution issued from De Soto circuit court on the 24th of November, 1843, founded on a judgment in that court in favor of Goodman & Means, for $79.58 against Benjamin B. West, and that it was levied on a slave named Isaac, as the property of West.

That William A. Brown, in January, 1843, purchased the boy Isaac from West and his wife, and paid $550 for him, and took their joint bill of sale for him; Brown agreeing that if they could sell him for more than $550, he would relinquish his title upon the repayment of his money. That Burford, in November, 1843, agreed with West about the purchase of the boy, and paid "or caused to be paid," the $550 to Brown and $25 to West, but failed to take an assignment from Brown of the bill of sale executed to him by West and wife. That the boy was Brown's property before the date of the judgment, and that the right passed from Brown to complainant, when he purchased, *or* that the sale to Brown was conditional, and that the title to the boy was in West's wife, subject to the condition, and that the boy never belonged to West. That West removed from De Soto county with sufficient property to have satisfied the judgment, since the judgment was rendered. The prayer was for an injunction to be made perpetual.

In their answer Goodman & Means admit the judgment, execution and levy, as charged: Require proof as to the alleged sale of the negro boy to Brown, by West and his wife: Deny that the boy was Brown's property, and insist that when Brown's money was repaid to him, the title reverted to West: Deny that West's wife ever had any title to the boy: Are informed and believe that West ran away about the 1st of November, 1843, to avoid his creditors, and that he carried off property, but deny that they knew the fact at the time.

Vincent Haralson testifies, that West married his daughter in December 1837, and that he gave West a negro girl named Henney, in the Spring of 1838, and has since seen the girl in the possession of Lemuel H. Cole.

Lemuel H. Cole testifies, that in 1842 he exchanged with West a negro man named Amos for a girl named Henney, and

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afterwards exchanged with him a negro boy named *Isaac* for Amos. That he made a bill of sale to West for Amos, but West afterwards requested that it should be made to his wife, which was done. In August, 1846, witness, saw Isaac at work on West's Plantation.

William A. Brown testifies, that in February, 1846, he purchased the boy Isaac from West for $350, and agreed that he might redeem him in September or November following, by his paying four hundred dollars — that West failed to redeem him at the time and he gave him $150 more, and took his bill of sale and that of his wife in November, 1843, at which time he gave him also the privilege of redeeming the negro, if he could sell him for more money. West sold the boy to Burford on the same day, before the witness had left town, for $25 more than witness had paid, and witness then gave West up his bills of sale; West telling Burford, who was counting the money, to pay it to witness, which he did in part, and West paid witness the balance and gave Burford a bill of sale. That he considered his purchase an absolute one and granted to West the privilege of reselling by refunding the amount paid. That Burford asked him if he would relinquish his title to the slave, to which he replied that he would do so to West, when his money was paid, and not till then. That West then had in his possession a negro woman, a stud-horse and a saddle-horse. He did not propose to assign his title to Burford, nor to sell Isaac as his property; the agreement to allow West to redeem was part of the contract of sale at the time it was made. He never had the boy in possession; he always remained in West's possession. The redemption money did not all come from Burford, but the greater part of it did.

There was other testimony taken, not, however, varying these facts.

Upon this state of facts the court pronounced a decree perpetuating the injunction.

William. F. Stearns, for appellants.

1. Even supposing that the negro girl Henney, with which

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West acquired Isaac, had been given to West's wife, by her father, yet as the gift was made in 1838, before the passage of "woman's law," the property vested in West, whose subsequent conduct, in procuring a bill of sale to be made to his wife, could not divest him of the property in her favor. The property, then, was West's up to the time of the conditional sale, or pledge to Brown.

2. Burford traded, not with Brown, but with West, and as soon as Brown received his money back, the negro was West's property, and the lien of our judgment, attached. There is no proof as to the date of our judgment, but this court, I presume, judicially knows that the De Soto circuit court was held in September, in 1843. Our judgment, therefore, must be older than Burford's purchase, and it follows, as I conceive, as a necessary consequence, that we had a lien which we had a right to enforce by a sale of the property.

3. If we had seen West going off with his property, and knew that he had sold a negro to Burford, it would, certainly, be inequitable to permit us to proceed against that negro in the hands of Burford, provided we had done anything to prevent our execution from being levied on the other property. But no knowledge of the fact of the removal, or of the intention to remove, is brought home to us.

McNutt and *Paxton*, for appellee.

1. The payment to Brown, and the purchase by Burford, were parts of one transaction; the money was paid by Burford to Brown directly; and the purchase was of Brown's interest, which was that of absolute ownership.

2. An equity of redemption in personal property, is not liable to sale under execution at law. *Thornhill* v. *Gilmer*, 4 S. & M. 158.

Mr. Justice THACHER delivered the opinion of the court.

Burford filed his bill in equity in the circuit court of De Soto county, to enjoin a sale under execution, of a slave, which he claimed as his property. This execution, which bore date the

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24th day of November, 1843, was issued upon a judgment obtained against Benjamin B. West. In the month of January, 1843, and prior to the rendition of the judgment aforesaid, West sold the slave in question to William A. Brown for $350, who also agreed that West might redeem him in either the month of September or November following, upon paying $400, which West having failed to do, Brown in November, 1843, gave West $150 more, and took a bill of sale of the slave from West and wife. At this juncture, Brown again agreed that West might redeem the slave, if he could sell him for more money, and the same day he bargained with Burford for the sale of the slave, at an advance of twenty-five dollars over Brown's amount of purchase-money. Burford received the slave from Brown upon paying him $500, and took a bill of sale from West. Brown gave up to West his bill of sale.

The testimony of Brown proves that his purchase of the slave in February, 1843, was *bona fide*. He says that he purchased the slave of West in February, 1843, for which he gave him $350, and agreed to let him redeem the slave in September or November following. Brown does not say that the sale was not absolute to him, or that the agreement permitting West to redeem the slave was a part of the contract of the sale. The language will not bear such a construction that the agreement constituted a part of the contract, nor will the supposed inadequacy of the consideration aid in supporting such an opinion. *Lane* v. *Dickerson*, 10 Yerg. 373. This agreement was altogether *ex gratia* upon the part of Brown, for the testimony elsewhere shows a strong disposition on his part to befriend West, who was in difficulties. Brown adds that West failed to redeem the slave at the time allowed, whereupon Brown also adds he gave West $150 more, and took a bill of sale from him and his wife. This sum can only also be considered in the light of a gratuity, for he had distinctly declared previously that the purchase-money was fixed at $350. But even after this gift of $150, Brown expressed his willingness that West should sell the slave again if he could find a purchaser, at a greater sum than $500, which he had already

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given, and this actually occurred. These circumstances only evince a liberal spirit of generosity in Brown towards West. The sale to Brown in February, 1843, was *bona fide* and absolute, but admit that the agreement to redeem actually existed even up to the time of the date of the judgment upon which the execution issued, the judgment became a lien only upon a mere contingency or privilege which West failed to avail himself of. There was never a period after the original sale to Brown, that the title to the slave became reinvested in West. The sale to Burford by West was but the exercise of an agency allowed him by Brown, and was not a transfer of title to West. The formalities observed respecting the return of the bill of sale, and the execution of a bill of sale by West to Burford, amount to nothing in a case of bargain, sale, and delivery of personal property.

Decree affirmed.

Mr. Justice CLAYTON delivered the following dissenting opinion.

I differ from the majority of the court in this case. Brown, whose deposition is taken, thus states the transaction: "I purchased Isaac of West in February, 1843, for which I gave him $350, and agreed to permit him to redeem said negro in either September or November following, by his paying $400. West failed to redeem at the time, and I gave him $150 more and took a bill of sale from him, at which time I gave him also the privilege of redeeming said negro, if he could sell him for more money. Before I got out of town on this last mentioned day, West sold Isaac for twenty-five dollars more than I had given him, to Burford, and I then gave him up, viz. (West) the bill of sale, when Mr. Burford, who was counting the money for West, was requested by West to hand it over to me; he did so in part, and West paid me the balance, and gave a bill of sale to said Burford."

In answer to a direct interrogatory on the subject of this last sale, Brown said, "he considered the purchase absolute, and granted to West the privilege of reselling by refunding the amount I paid him for the boy, as a matter of contract."

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Brown did not at any time have the negro in possession, but he remained with West until delivered to Burford.

In my view, the original contract, as detailed by Brown, was either a mortgage or a sale, with liberty to repurchase. If closely scrutinized in connection with the other testimony, it was probably the former, but I shall regard it as the latter, because that is the most favorable position for Burford. The contract then passed the legal title to Brown, with an equity in West to divest such title, by a given day, by compliance with certain terms. By such compliance, the title would revest in West.

The judgment of Goodman & Means was obtained before the day appointed for repayment or repurchase, and it bound this equity. It became a lien which they could have enforced, as against West and Brown both, in a court of chancery. The judgment bound the actual interest of West, whatever it might be.

Brown paid West $150 for this right of repurchase, after it was bound in his hands by the judgment. When West sold to Burford, Brown surrendered his title to West, who made a new title to Burford. Brown says expressly, he neither pretended to sell the boy to Burford, nor to assign him the bill of sale. At most, West could only pass to Burford the interest of Brown; this was incumbered by the lien of the judgment, to the extent of the $150, which was the agreed value of the right of repurchase.

There is room to contend that the whole title was bound by the judgment, as soon as it revested in West. But I look at the substance, rather than the form, and limit the lien, as it existed in the hands of Brown. But there was a clear vesting of the legal title in West, at the moment; the lien which had attached to the equity adhered to it, and became operative upon the legal title in his hands, and subject to the execution. Burford received the title in that condition. A transitory seisin for an instant, will not let in an incumbrance, to the manifest injustice of the case. 4 Kent, 38. Yet a court of equity may lay hold of this instantaneous seisin to work out the ends of justice.

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In this case that end seems to me to be promoted, by holding that the lien is entitled to satisfaction *pro tanto*, out of the equity of West, which became annexed to the legal title in his hands after the judgment, for the purpose of his making title to Burford. And this is especially the case, as Brown never had possession of the slave nor title, but for a few hours by bill of sale. Even his preference over the judgment creditor is, in my apprehension, by no means free from doubt.

JAMES S. MCCLURE *vs.* ROBERT B. HOUSTON.

The statute (How. & Hutch. 481, § 8,) authorizes the circuit judge to take, under advisement, in vacation, motions for new trials, and to give his opinion in writing, within a prescribed time, to the clerk; where, therefore, a circuit judge has so taken a motion for new trial, under advisement, and has in the proper time given his opinion in writing, granting the new trial, it is error for the circuit court at its next term to strike the case from the docket; if there were error in the opinion of the judge granting the new trial, the same statute grants the right to except, and take writs of error to such judgment to the high court of errors and appeals.

IN error from the circuit court of Lafayette county; Hon. Hugh R. Miller, judge.

This was an action of slander, commenced in the circuit court of Lafayette county, by James S. McClure against Robert B. Houston. The latter plead justification, and upon issue joined thereon the jury found the plea false, and assessed the plaintiff's damages at three dollars and fifty cents. A motion was then entered by plaintiff's attorney, on the 28th of May, 1845, for a new trial, because the damages were inadequate, and inconsistent with the issues as found by the jury. At the May term, 1845, this motion was taken under advisement by the judge, J. M. Howry, Esq., then presiding, who, on the 20th September, 1845, returned the papers with a written opinion sustaining the motion for a new trial. At the April term, 1846, upon motion of defendant's counsel, the cause was ordered by Judge Miller to be stricken from the docket, as having been im-

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properly placed thereon, because the testimony had not been reduced to writing by the judge granting the new trial; to which order or judgment of the court below plaintiff excepted, and brings the case to this court.

D. C. Glenn, for plaintiff in error.

1. In my view this was an erroneous and somewhat arbitrary proceeding. If the new trial was improperly granted it was error, and the party's remedy was by appeal or writ of error.

2. The cause assigned by the judge for thus turning the plaintiff out of court, cannot be noticed in this case. It can only be done where the appeal is direct, assigning such failure as error. But even if it could it seems that it would not be deemed error. Though the granting or refusing a new trial is made error by our statute, still the appellate court will not interfere unless the record shows great improvidence in its being done, and leaves it pretty much to the discretion of the *nisi prius* judge, as it formerly stood. The statute in question, as to new trials, is merely directory to the court, and it having exercised its discretion this court will presume it has been wisely done in a matter within its jurisdiction, unless the contrary is manifestly made to appear. Robinson's Va. Prac. 378.

Mr. Justice THACHER delivered the opinion of the court.

In this case, the judge of the circuit court took under advisement a motion for a new trial, which motion he sustained in an opinion in writing, within the limit of time prescribed by the statute. How. & Hutch. 481, § 8. At a subsequent term, the cause, upon motion of the opposite party to the original motion, was directed to be stricken from the docket of the circuit court.

It was error in the circuit court to direct the cause to be stricken from the docket. If there were any error in the judgment of the circuit court sustaining the motion for a new trial, the same statute which authorizes the proceeding of the circuit

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court in taking causes under advisement, grants the right to except and take writs of error to such judgments returnable to this court.

Judgment reversed, and the cause directed to be reinstated upon the docket of the circuit court of Lafayette county, for further proceedings.

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ELOISA C. CAMERON *vs.* DUGAL A. CAMERON ET AL., Executors of John Cameron, deceased.

A wife has not such an interest in the personal estate of her husband, as that an absolute and irrevocable, though merely voluntary deed thereof, executed by him to his children, even by a former marriage, can be considered a fraud on her rights; nor will it be set aside at her instance.

Therefore, where C. executed a deed of trust on personal property to M., as trustee for the use and benefit of C.'s two sons, and reserved to himself the possession and control of the property during his own life; it was *held*, that the deed of trust, though voluntary, was absolute and irrevocable, and was not therefore a will in disguise; and that on the death of C., his widow was not entitled to any interest in the estate conveyed by the deed of trust.

On an application for dower in personalty, if it appear that the testator did not own the property in which the dower is sought, at the time of his death, it is the duty of the probate court to refuse to allot the dower.

ON appeal from the probate court of Franklin county; Hon. James M. Jones, judge.

Eloisa C. Cameron filed her petition in the probate court, alleging that she was the widow of John Cameron, deceased, who died in December, 1844, leaving a will; whose executors were Dugald R. Cameron, since dead, Dugal A. Cameron and John P. Stewart, all of whom qualified; that by his will, the testator attempted to make provision out of his property for her, but within the time limited, she renounced the will; that besides his lands, the testator left about ninety slaves and other personalty; for none of which, nor the proceeds of their labor, had the executors accounted. That Dugald R. Cameron and Frank-

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lin Cameron, a minor, were the only children of the testator; the former being dead, she claimed her distributive share of the personalty according to the statute.

The executors answered the petition, denying that any slaves or other personalty of their testator, not accounted for, had come into their possession. They state that in his lifetime, the testator conveyed these slaves and other property to John Montgomery in trust by deed, of which the following is the substance, viz.:

"Know all men by these presents, that John Cameron of the County of Franklin and State of Mississippi, for and in consideration of the uses and trusts herein more fully stated, and of the sum of five dollars to me in hand paid by John Montgomery of the County of Madison and State of Mississippi, the receipt whereof is hereby acknowledged, have this day bargained, sold and delivered, and by these presents do bargain, sell and deliver unto the said John Montgomery, the following named negro slaves, to wit: Henry, &c., &c., (here follows a description of the property) to have and to hold unto the said John Montgomery, to and for the uses, purposes and trusts following, to wit: to permit the said John Cameron to use, possess and control the said property, and the proceeds and natural increase thereof during my natural life, without any hindrance, claim or interference from him the said John Montgomery; secondly, at my death, or as soon thereafter as the crop growing at my death shall be gathered and disposed of, to deliver and convey by proper deed for that purpose, the lot of slaves mentioned, (here describing certain parts of the property previously conveyed) to my son Dugald R. Cameron; and further, thirdly, to take possession of and manage the lot of slaves, (here describing another part of the property previously conveyed,) to my son Franklin; fourth, if either of my said sons shall die without issue at the time of his death, the whole property above-mentioned shall be conveyed and delivered to the other; but if issue be living, the conveyance shall be to such issue; fifth, if both of my sons shall die without issue living at the time of their death, in my lifetime, then I resume the power

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and authority in that event, to appoint by deed or will, the uses, purposes and trusts, to which said property shall be applied; but in case no appointment be made, then the said property shall be held by the said John Montgomery, in trust, for the use and benefit of my right heirs forever. In testimony whereof, &c."

Upon hearing on the petition and answers, the probate court being of opinion that the answers presented a complete bar to the petition dismissed it, and the petitioner appealed.

J. Marshall, for appellant,

Contended, 1. That the *executors* could not set up the deed of trust, for they were not parties to it, if they were in possession of the property they claimed through the testator, and were bound to admit the widow's right. *Wooldridge* v. *Wilkins*, 3 How. (Mi.) R. 360; *Randolph* v. *Doss*, 3 Ib. 205; *Doss* v. *Armstrong*, 6 Ib. 258.

2. If the proper parties had been before the court, the probate court had no power to adjudge the question of title; it should have allotted the dower, and let the other courts, having jurisdiction, adjudge as to the ownership. *Holloman* v. *Holloman*, 5 S. & M. 559; *Farmers and Mechanics Bank of Memphis* v. *Tappan*, Ib. 112; *Ware* v. *Washington*, 6 S. & M. 737; *James* v. *Rowan*, Ib. 393.

3. As against the executors and heirs, the widow is entitled to dower in mortgaged property. *Whitehead* v. *Middleton*, 2 How (Mi.) R. 692; *Rutherford* v. *Munce*, Walk. 370; *Wooldridge* v. *Wilkins*, 3 How. (Mi.) R 360.

4. The decision of the probate court went to the extraordinary length, that the property conveyed by the deed was not John Cameron's when he died. The probate court had no right to adjudge the question; it had no power to decide it. The widow had a right to her dower, and it should have been granted; and the contest as to the validity of the deed, can arise in a court of adequate and full jurisdiction.

Chilton and *Tompkins*, for appellee.

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Mr. Justice THACHER delivered the opinion of the court.

Eloisa C. Cameron filed her petition in the probate court of Franklin county, for an allotment of dower in the personal estate of her deceased husband. The answer of the executors sets up, that the husband, a short time before his decease, made and executed a deed of trust of the property in question to John Montgomery, as trustee, for the use and benefit of the grantor's two sons, Dugald and Franklin.

In a case of this kind, the only inquiry need be whether the deed of the husband is absolute and irrevocable or not. It is the undoubted right and privilege of a husband to dispose of his personal estate in any manner he thinks proper in his own lifetime, and to thus cut off his widow from dower in such property; and a voluntary conveyance will be good against the claims of the widow. In the case of *Lightfoot's Executors et als.* v. *Colgin et ux.* 5 Munf. 42, which is a case almost in every respect like the one at bar, for in the present case the deed of trust is voluntary and irrevocable; it was held, that a wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a will which she may renounce, as that an absolute and irrevocable, though merely voluntary deed thereof, executed by him to his children, even by a former marriage, can be considered a fraud on her rights, or be set aside at her instance; and, that a deed of trust, if not revocable by the grantor, is not to be considered a will in disguise, on the grounds that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life. The reasoning of the court establishing these principles is clear and conclusive.

It having been apparent to the probate court that the claim of dower did not lie in the property in question, the bill was properly dismissed as to it.

Decree affirmed.

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JOSEPH S. COPES *vs.* JAMES E. MATTHEWS.

In the ordinary course of things an agent, contracting in behalf of the government, or of the public, is not to be presumed to have bound himself personally, nor is it to be presumed, that the party dealing with him in his public character, means to rely on his individual responsibility; but the contrary may be shewn by proof, or circumstances which clearly establish an intention between the parties to the contract to create and rely upon a personal responsibility on the part of the public agent.

M. being auditor of public accounts, was sued in assumpsit by the assignee thereof, for value on this writing: "W. wishes to anticipate his salary from the first of November, 1844, to November 1, 1845; he has discharged his duty faithfully in my office; I shall continue W. in the office until my time expires, which is November 1, 1845, and will issue his pay monthly, as the law allows, *and will pay over to the holder of this obligation* at the rate of eight hundred dollars per annum in treasury warrants." The writing was signed "M., auditor of public accounts; the declaration averred as a breach, that M. had not paid the eight hundred dollars, but did not aver, that W. had performed the services: *Held*, that a demurrer was properly sustained to the declaration.

IN error from the circuit court of Hinds county; Hon. George Coalter, judge.

Joseph S. Copes sued James E. Matthews, in the following declaration: "For that heretofore, to wit, on the 7th day of November, 1844, at Jackson, to wit, the county aforesaid, the said defendant made his certain writing, or letter of credit in these words and figures, to wit: "Mr. Jas. Wade, wishes to anticipate the amount of his salary from the first November, 1844 to first November, 1845. Mr. Wade has discharged his duty faithfully as clerk in my office. I shall continue Mr. W. in the office until my term expires, which is, as above stated, until first November, 1845; and will issue his pay monthly as the law allows; and will pay over to the holder of this obliga-

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tion, at the rate of $800 per annum, which will be $66.66⅔ per month in treasury warrants. Jackson, Nov. 7th, 1844.

(Signed,) JAMES E. MATTHEWS,
Auditor of Public Accounts."

"And the said James Wade, to whom the said writing or letter of credit was delivered and given, afterwards, to wit, on the 11th day of December, 1844, transferred and assigned in writing, the said writing in these words and figures, to the said plaintiff, viz: 'I hereby transfer to J. S. Copes, the above statement of James E. Matthews, auditor, for value received, this 11th December, 1844, subject to the credit entered on the back, of $66.66⅔, which being my pay for the month of November, 1844, I have already drawn.

[Signed,] 'JAMES WADE.'"

"And the said plaintiff avers, that then and there, on the faith and in consideration of the said writing, of the said defendant Matthews, and its transfer and delivery to him (the plaintiff,) he then and there advanced to the said James Wade, the sum of three hundred and ten dollars, to be paid him on the first days of January, February, March, April, May and June, 1845, in equal monthly instalments, as they severally fell due. By means whereof the said defendant became liable to pay him, the plaintiff, the said sum, as aforesaid, whenever thereafter requested, and being so liable, promised so to do, &c."

"And for that, &c., the said defendant made another certain letter of credit in favor of the said James Wade, and delivered it to him, thereby authorizing any one to advance the said Wade the sum of eight hundred dollars, the amount of the salary of the said Wade, as the clerk of the said defendant, from the first day of November, 1844, to the first day of November, 1845; and by the said letter of authority, promised to retain the said Wade in office as his clerk, for the period aforesaid, and to pay over to the holder of the said letter, the said sum of eight hundred dollars, in monthly instalments, at the rate of sixty-six dollars and sixty-six and two-third cents per month, in treasury warrants. And the said James Wade to whom the said letter of credit, or authority was given, after-

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wards, to wit, on the 11th day of December, transferred in writing the same to the plaintiff, for value received, and then and there delivered it to the plaintiff; by means whereof the said defendant became liable to pay the plaintiff the sum of eight hundred dollars, &c." The ordinary *super se assumpsit* and the breach that the defendant had not paid the money, concluded the declaration. The defendant demurred, and assigned for cause. 1. That the instrument given Wade, did not form any obligation in Wade's favor against the defendant, apart from conditions to be by him performed and was in no event assignable. 2. That if defendant's writing were a letter of credit, the declaration did not contain averments sufficient to impose liability on him. 3. The declaration was uncertain as to the amount demanded. 4. The declaration omits the proper averments as to the time, place, &c., and was in other respects informal.

The court below sustained the demurrer, and the plaintiff sued out this writ of error.

A. C. Baine, for plaintiff in error, contended,

1. That there was no substantial defect in the declaration. He cited *Thrasher* v. *Ely*, 2 S. & M. 139, to show that Copes was not bound to give Matthews notice of the advance to Wade.

2. That the undertaking on the part of Matthews was not a conditional one; but was a direct undertaking to pay the holder, and such as Matthews was fully empowered to make. *Lawrason* v. *Mason*, 3 Cranch, 492.

3. If Matthews had no authority, as auditor of public accounts, to make the contract sued on, he had the power to bind himself individually; and cannot now shield his private liability under his official cloak.

4. It was not necessary to have alleged a value to the auditor's warrants; the court is bound judicially to know that they are at par. A jury would have been authorized to find for plaintiff. *Lewis* v. *Farish*, 1 How. Miss. R. 547.

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Hutchinson, for defendant in error.

1. The defendant did not bind himself absolutely. The engagement he gave Wade could not be construed to be an obligation to pay the holder, or that he would retain Wade in his office, whether he acted faithfully and honestly or not; whether the exigencies of the public services required it or not; whether he died or resigned. It clearly contemplated the discharge by Wade of his duties.

2. But the declaration nowhere alleges that Wade discharged his duties, and thus became entitled to his salary; unless he did do so, he could not draw any salary, and the defendant could not pay any, which was all he undertook to do. This defect alone is fatal.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an action of assumpsit, containing two counts. The first is on the following instrument: "Mr. James Wade wishes to anticipate the amount of his salary from the 1st of November, 1844, to 1st November, 1845. Mr. Wade has discharged his duty faithfully as clerk in my office. I shall continue Mr. Wade in the office until my time expires, which is, as above stated, until 1st November, 1845, and will issue his pay monthly, as the law allows, and will pay over to the holder of this obligation at the rate of $800 per annum, which will be $66.66⅔ per month, in treasury warrants. Jackson, November 7, 1844. James E. Matthews, Auditor of Public Accounts." The other count was upon the same instrument as a letter of credit. They both endeavor to fix an individual responsibility upon the defendant. There was a demurrer to the declaration, which was sustained in the court below.

The acts of public officers or agents in regard to the creation of a personal liability, stand on a very different footing from those of private agents. In the ordinary course of things, an agent contracting in behalf of the government, or of the public, is not to be presumed to have bound himself personally, nor is it to be presumed that the party dealing with him in his public character, means to rely on his individual responsibility. *Mac-*

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beath v. *Haldimand*, 1 T. R. 172; *Hodgson* v. *Dexter*, 1 Cranch, 345; Story on Agency, 306. This is the general rule, but the presumption may be rebutted by proof or circumstances, which clearly establish an intention between the parties to the contract to create and rely upon a personal responsibility on the part of the public agent. Such officer may waive his personal exemption and immunity, and become responsible, if such be the mutual intention and agreement. Story on Agency, 310. But to create such personal liability, the proof ought to be clear and full. Ib.

In the present case, there is nothing to show an intention upon the part of the defendant to charge himself personally. The duties to be performed by Wade were for the public, the payment to be made was in "treasury warrants," which the defendant had no right to issue, except in his official capacity. The whole instrument contemplates an official, not a personal responsibility. The state was bound to pay the salary of the clerk. This instrument was intended to enable him to anticipate his salary. If he failed to perform the services, there was no obligation to pay upon the part of the state. The assignee necessarily took this risk upon himself. The declaration nowhere avers the performance of the services. In the absence of such averment it shows no right of recovery.

Whether the defendant would be liable, in any other form of action, or any other state of case, we cannot now undertake to decide.

The judgment is affirmed.

JAMES W. EVANS *vs.* JOHN EVANS ET AL.

Under the statute of this state (How. & Hutch. 385,) which provides that there shall be three or more witnesses to a will when real estate is devised, and two when personal, (unless the will be wholly in the handwriting of the testator, when no witness is required,) a will cannot be admitted to probate, unless all the subscribing witnesses, alive and within the control of the process of the court, are produced to testify.

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On appeal from the probate court of Ponola county; Hon. J. T. M. Burbridge, judge.

James W. Evans filed his petition in the probate court, to set aside the probate of the will of his father, John Evans, deceased, made at a former term of the court, on the ground of the insanity of the testator; and also on the further ground that the will devising real and personal estate, though attested by three witnesses, had been admitted to probate on the proof of but one, though the others were living, and within the jurisdiction of the court. The heirs of John Evans and his widow were made defendants to the petition. They answered, denying the insanity of the testator, but admitting the mode of probate of the will.

The court below, upon the hearing of the petition, answer and proofs, the latter taken on the point of insanity, dismissed the petition, and the petitioner appealed.

William and *William G. Thompson*, for appellant.

D. C. Glenn, for appellees, cited 2 J. J. Marsh. 511; 2 A. K. Marsh. 467; Litt. Sel. Cas. 503; 1 B. Mon. 57; 4 Cow. 483; 2 Nott & McCord, 588; 19 Johns. 386; 1 Peters, 508; 2 Har. & J. 86; 7 Halst. 70; 1 Green's Ch. R. 8; Pow. Dev. 708, 709; 5 Monr. 199; Black. R. 365; Gibb's Rep. in Eq. 364; 1 Con. R. (So. Car.) 336; 1 Green's Ch. 220; 3 Phil. Ev. (Cow. & Hill's notes,) 1349–1351.

Mr. Justice Thacher delivered the opinion of the court.

The sole question presented by the appellant's counsel in this case is resolved into the inquiry whether a will can be admitted to probate upon the testimony of but one of the attesting witnesses to such will.

We are inclined to hold that no will can be proved, unless all the subscribing witnesses, alive and within the control of the process of the court, are produced to testify. In *Chase et al. v. Lincoln*, 3 Mass. 236, the court observed that "the legislature, in requiring three subscribing witnesses to a will, did not

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contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed around the testator to ascertain and judge of his capacity, and the heir has a right to insist on the testimony of all the three witnesses to be given to the jury." In *Sears* v. *Dillingham*, 12 Mass. 358, it was contended that no will can be proved unless all the witnesses are produced to testify. The court said: "This, as a general rule, is undoubtedly well settled both here and in England."

The decree must be reversed, and the cause remanded for such further proceedings as may be desired.

MICHAEL BAILEY ET AL. *vs.* RICHARD DILWORTH, Judge of Probate of Monroe County, use of John B. Hunter et al.

Executors and administrators are bound to the exercise of such prudence and caution in the administration, as a judicious man, looking to his own interests, would exercise in regard to his own affairs.

They may compound debts, or enter into arbitrations, and these acts will be upheld, if they are fair, beneficial to the estate, and free from fraud, negligence and misconduct.

If, therefore, executors or administrators collect debts in bank paper not strictly at par, when the best interests of the estate require it, and when nothing better can be done, their conduct will be sustained; but in such case it will be their duty to convert the funds so received into something less perishable, with as little delay as possible.

Where a decree of the probate court is rendered, confirming and allowing the final account of an executor and administrator, by which the executor is brought into debt to the estate in a s pecified sum, in dollars, without distinction of currency, *constitutional currency* will be thereby intended; and in an action on such executor's or administrator's bond to recover the amount so decreed, it will be competent for the executor or administrator to show that in good faith he collected depreciated paper of local state banks, when it was the very best he could do for the estate; and that the balance of his final account against him was for this depreciated paper; the decree of the probate court being *for so much money*, was final and conclusive between the parties until reversed, and could not thus incidentally be rendered of no value by the circuit court.

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Where an administrator has collected the debts due his intestate, in depreciated bank notes, he should report fully his proceedings to the probate court, that, that court may make such allowances to him as the circumstances warrant, and may render a decree accordingly; if he omit to do so, and allow a decree to be rendered against him in the probate court for the full amount of the money thus received, it will be too late for him afterwards to attempt a defence thereto, when sued on his bond for the money thus decreed against him.

In October, 1840, the probate court confirmed the final account of an executor, by which he appeared to be in debt to the estate in the sum of $4,000; and, in January, 1841, the court entered a decree against him to pay the money, upon which the executor paid to the clerk of the probate court the amount of the decree in the notes of different banks much depreciated; the executor being afterwards sued on his bond for the amount of this decree, offered to prove this payment to the probate clerk; *held*, that being made to an officer who had no authority to receive it, it could have no influence on the case.

In error from the circuit court of Monroe county; Hon Francis M. Rogers, judge.

Richard Dilworth, judge of the probate court of Monroe county, for the use of John B. Hunter, guardian of the person and estate, real and personal, of Joseph John Kirk, infant son of John Kirk, sued Michael Bailey, Elisha D. Prewett and Kirk Prewett, upon their bond for the faithful discharge by Bailey of his duties as executor of the last will and testament of John Kirk. The principal breach assigned was the non-payment by Bailey of the distributive share of Joseph John Kirk, in the sum of $3,889.75, decreed by the probate court, at its January term, 1841, to be due by the executor. The plea of payment and other pleas were filed, but it was agreed between counsel, that under the plea of payment any legal matter of defence might be given in evidence as if specially pleaded.

A trial was had and verdict rendered for the plaintiff for $2,411. The defendants moved for a new trial, which was refused, and they embodied the evidence in a bill of exceptions.

On the trial, the plaintiff read to the jury the final account and settlement of Bailey, as executor, made with the probate court at its October term, 1840, which showed a balance against the executor of $4,283.42, and concluded in this way: "The

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above settlement shows a final settlement of the administration of the estate of John Kirk, deceased, by M. Bailey, Esq., made 7th October, 1840. M. BAILEY, *Ex'r.*

State of Mississippi, Monroe county; Probate Court, October term, 1840.

Examined, ordered to be recorded and filed.

R. DILWORTH, *Judge of Probates.*"

The plaintiff then read the final decree of the probate court at its January term, 1841, as follows, viz.: "This day again came Michael Bailey, executor of the estate of John Kirk, deceased, and John B. Hunter, and Jane Amanda, his wife, late Jane Amanda Kirk, now wife of said John B. Hunter, and William Smith, the guardian of Joseph John Kirk, infant son and only child of the deceased John Kirk, whereupon, after hearing of the parties, the court is of opinion that the said Michael Bailey, as executor, holds three thousand eight hundred and eighty-eight dollars and seventy cents, after the payment of all the debts, besides some uncollected debts, which were returned desperate and due the estate of John Kirk, which will more fully appear by reference to the settlement made at the last term of this court, and the vouchers then filed.

"It is therefore adjudged, ordered and decreed, that the said Michael Bailey, executor as aforesaid, pay to the said John B. Hunter and wife, one moiety of the said sum of three thousand eight hundred and eighty-eight dollars and seventy cents, and the other moiety to the said William Smith, the guardian of the said infant distributee. Whereupon the said Michael Bailey, Esq. as aforesaid, paid into the hands of the clerk the sum of three thousand eight hundred and eighty-eight dollars and seventy cents, in the bank bills of the Mississippi Union Bank, and in the bills of the Aberdeen and Pontotock Railroad and Banking Company, and twenty dollars in Brandon and real estate, in satisfaction of the above decree; which the said John B. Hunter and wife, and William Smith, guardian as aforesaid, refused to receive, and thereupon the said Michael Bailey offered to prove that he had received and collected said bank bills in the course of the administration of said estate; which was objected

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to and sustained by the court, to which opinion of the court in sustaining said objection, and in refusing to hear said testimony, the said Michael Bailey excepts." This decree was duly certified.

The defendant objected to the reading of this evidence, but the objection was overruled.

The defendants, by their counsel, then introduced the Hon. Samuel J. Gholson as a witness, by whom they offered to prove that he had acted as the counsel of the defendant, Michael Bailey, to instruct him in the proper discharge of his duties as administrator as aforesaid, and the defendants also offered to prove by him, that during the administration of Kirk's estate from the general embarrassed condition of the whole country, and the civil officers everywhere yielding to the public feeling, and refusing to sell property for anything but the currency furnished by the banks of the state of Mississippi, he, as defendant's counsel, advised him to take in payment of the debts due to the estate, the notes of the Aberdeen and Pontotock Railroad and Banking Company, and the notes of the Mississippi Union Bank, which were at that time at a discount of from four to five per cent. below specie; that the best interests of the estate demanded that he should take that course, it being the best that could be done at the time, it being utterly impossible to collect specie. The defendant further offered to prove by Gholson, that the amount of the decree had been collected of persons in failing circumstances, upon debts created by Kirk in his lifetime, but the court refused to allow the testimony to be introduced on the ground that the questions had been already litigated and determined in the probate court.

The defendants offered to prove similar facts by George Wightman, but was not allowed to, and also offered to read to the jury the notes of the different banks offered in payment by the defendants; this was also refused.

The plaintiff asked the court to instruct the jury that if they believed from the evidence, that the probate court made a decree, and ordered the sum of money therein to be paid to the plaintiff, they must find for him, unless they believe from the evidence the money has been paid. This was given.

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The defendants asked the court to instruct the jury, that unless the plaintiff has shown an order or decree of the probate court, directing the bond of the executor to be put in suit, they must find for the defendants as by way of nonsuit. This was refused.

Exceptions being signed, this writ of error is prosecuted.

Reuben Davis, for plaintiffs in error, and *Harris* and *Harrison*, for defendant in error, made the following agreement in this court:

"It is intended to submit this case upon the single point, as to whether the defence set up in the court below, as detailed in the testimony of Samuel J. Gholson and George Wightman, and excluded by the court, was a bar to the action; and whether the action of the court of probates upon the subject was exclusive, or final and conclusive until reversed by due course of law. It is the wish of both parties to have the case settled upon the merits, and to avoid all matters of delay."

Harris and *Harrison*, for defendant in error.

The court below properly excluded the testimony of Gholson and Wightman.

1. Because the action of the probate court was final and conclusive between the parties, until reversed by due course of law. 1 How. (Mi.) Rep. 450; 5 Ibid. 736; 1 S. & M. 130.

2. The circuit court had no jurisdiction over the questions attempted to be raised upon the testimony offered, the jurisdiction of the probate court being exclusive upon all matters confided to it by the constitution.

3. The facts proposed to be proved constituted no legal or valid defence to the action, and could have been given in evidence under no plea known to the books.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action in the circuit court of Monroe county, upon the bond of Bailey, as executor, against him and his sureties. The amount due from him, had been ascertained by

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a final settlement with the probate court, which had been examined and allowed. This settlement showed him in debt to the estate nearly $4000, and the indebtedness was stated in general terms, without reference to any particular kind of funds. The probate court made a decree against the executor for the amount ascertained to be due, when Bailey paid the amount to the clerk of the probate court in bills of various banks and banking associations, then much depreciated. These the parties interested refused to receive. The executor then offered to prove that he had collected these bills in the course of administration, but the court rejected the testimony. The final account was received and allowed, at the October term, 1840, of the probate court; and the decree for the payment made at the January term, 1841, when for the first time the attempt was made to pay in depreciated paper.

Upon the trial in the circuit court, the defendant offered to prove that he had collected the debts due to the estate in the currency furnished by the banks of the state — that he had done so by the advice of distinguished counsel — that the debtors were many of them in failing circumstances — that the civil officers of the country refused to sell property for anything but the local currency, and that he received the notes as the best that could be done under the circumstances. This evidence was rejected by the court below, and the illegality of this exclusion is the matter assigned as error.

An executor or administrator represents the deceased. The most exact good faith is required of them, in all their transactions in regard to the estate. They are moreover bound to the exercise of such prudence and caution in the administration, as a judicious man looking to his own interests, would exercise in regard to his own affairs. They may compound debts, or enter into arbitrations, and these acts will be upheld, if they are fair, beneficial to the estate, and free from fraud, negligence or misconduct. *Kee's Executor* v. *Kee's Creditors*, 2 Grattan's Rep. 116; 2 Lomax Ex. 291-5; 5 Humph. Rep. 524. They partake of the character of bailees, and their acts in many respects are regarded in the same light. It hence results, that if they

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collect debts in bank paper not strictly at par, when the best interests of the estate require it, and where nothing better can be done, their conduct will be sustained. But then it would be their duty to convert the funds so received into something less perishable in a reasonable time, and with as little delay as practicable. But while we recognize these rules for the conduct of executors and administrators, we do not think the appellants are in a situation to invoke their aid. The account rendered to the probate court, and which was ratified and confirmed by it, was for dollars in *numero*, without distinction of currency. The decree rendered by the court was of the same character. There was the place to make this defence.

This court has often decided, that the decrees of the probate court, where it has jurisdiction, are conclusive until reversed. To hold that a decree for *dollars*, means not constitutional currency, but the depreciated issues of worthless banks, would virtually set aside this whole doctrine. The consequence would be, that while the circuit court could not directly revise the decree, it might incidentally render it of no value.

Had the account, as exhibited in the probate court, disclosed the true state of facts, that tribunal could have made such allowances to the executor, as the circumstances warranted, and have rendered a decree for what was right. It would have the same powers in this as in other matters of account.

To have suffered the testimony offered to go to the jury, would likewise have been against the rule, which excludes parol evidence to explain records, or other written instruments.

The payment or offer to pay to the probate clerk, can have no influence in the case, because that officer had no authority to receive the amount.

The judgment is affirmed.

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THE COMMERCIAL BANK OF MANCHESTER *vs.* HENRY J. ULLMAN ET AL.

An affidavit for an attachment under the law of 1844, which stated that the debtors "are about removing from the state, or are so concealing their effects as to defeat the creditor's claim," is sufficient to uphold the attachment; the verb '*removing*,' according to the true grammatical construction of the sentence, having relation to '*the effects*' and not to the persons of the debtor; and even if it related to the *persons*, it seems the affidavit would not be vitiated by having more in it than was sufficient.

Where to a writ of attachment, the magistrate had appended a scroll with the word 'seal' written in it, the writ was held to be sufficiently sealed, though nothing was said about the seal in the body of the writ.

The affidavit in an attachment, stated that Ullman and Hausman were indebted, &c.; the bond recited that Ullman and H. Hausman were indebted, &c., and the declaration declared against Henry Ullman and William H. Hausman; it was *held*, that the variance was immaterial.

IN error from the circuit court of Yazoo county; Hon. Morgan L. Fitch, judge.

The Commercial Bank of Manchester, by its president, made oath before a justice of the peace, that "Messrs. Ullman & Hausman, partners in trade, in the town of Yazoo city, are justly indebted to the said Commercial Bank of Manchester, in the sum of two hundred and thirty-three dollars and thirty-three cents, and that they have been informed, and have good reason to believe, and do verily believe, that the said Ullman & Hausman, are about removing from the state, or are so concealing their effects as to defeat their claim."

The president of the bank, executed bond, payable to Ullman & H. Hausman, conditioned in the ordinary way.

The writ of attachment was against Ullman & Hausman; and stated that the bank had made oath that Ullman & H. Hausman were indebted, &c. It was otherwise in the ordinary form in the body, and concluded in this way, viz.: "Witness,

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R. Eaton Keys, Justice of the Peace, the fifth day of March, A. D., 1845. R. EATON KEYS, J. P." [Seal.]

The attachment was duly levied, and Ullman & Hausman replevied the goods attached; and at the May term, 1845 of the circuit court, the bank filed her declaration in assumpsit, against Henry J. Ullman and William H. Hausman.

At the same term, the defendants moved to quash the attachment, because the bond and affidavit did not conform to the law. The motion was sustained and the bank sued out this writ of error.

W. R. Miles, for plaintiff in error.

The objection taken in the court below to the affidavit, was that it was in the alternative, and therefore made out too strong a case. And the court held in its opinion, that whilst a removal from the state, or a concealment of his effects by a debtor charged singly in the affidavit, would be sufficient ground for an attachment to issue; yet if both charges were combined, or if they were charged in the disjunctive, it would be insufficient. Such I do not think to be the spirit of the act. See Acts of 1844, 125-6.

N. G. and *S. E. Nye*, for defendants in error.

1. The attachment is for an amount greater than a justice of the peace can take cognizance of, and consequently made returnable to the circuit court; but instead of being tested in the name of the judge of the tenth judicial district, it is in the name of the justice of the peace who issued it. By our statute all process shall be tested in the name of the presiding judge, and must be under seal; though there is a scroll annexed to the justice's name, it nowhere appears that it was his intention to seal it. How. & Hutch. 576. The statute is peremptory that the justice granting an attachment shall sign and seal it. How. & Hutch. 557. An attachment not under seal, is not merely voidable but absolutely void. *Walker* v. *Winn*, 3 Yerg. 72; *McCullough* v. *Foster*, 4 Yerg. 162.

2. A signature like that of the justice who granted this at-

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tachment, viz., witness my hand, &c., and annexing a scroll, will not make it a sealed instrument. *Bohannon* v. *Hough*, Walk. R. 468.

3. There is a variance between the affidavit, the bond, the attachment and declaration, so great, that they cannot be identified as parts of the same case; leaving it a matter of considerable doubt whether the record brought up is the entire record of one case, or portions of records in different cases; they certainly bear no mark of similarity as to parties and amounts sufficient to identify them as portions of the same case.

4. It is a fatal objection to an attachment that it is founded on an affidavit, stating different causes for suing it out; one distinct, substantive fact must be sworn to, and the party must rely on that alone, and cannot state additional causes in the same affidavit. 9 Yerg. 428, Hard. 65; Ib. 342.

Mr. Justice THACHER delivered the opinion of the court.

A motion to quash the attachment in this case, because the attachment, bond, and affidavit, do not correspond to the law, was sustained in the circuit court.

The attachment was sued out under the act of 1844, ch. 15, entitled "an act to extend the remedy by attachment and garnishment." This act gives the remedy, as well as in other circumstances, when a debtor is concealing or about removing his effects so that the claim of a creditor will be defeated.

The language of the affidavit, in the present case, is, that the debtors "are about removing from the state, or are so concealing their effects as to defeat the creditor's claim." In grammatical construction, the removal here has relation to the effects, and not to the debtors. The term effects is the object of the verb to remove. The affidavit is good and sufficient, with both or either of the allegations, for it might be impossible for a creditor to swear positively to either, while he might be apprized that one or the other cause in fact existed. But even if a different construction be given to this affidavit, and it be admitted that the removal has relation to the debtors, and not to the

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effects, we are not prepared to say that such an affidavit would vitiate the attachment. In suing out an attachment, the affidavit must contain a sufficient allegation, but should it contain more than sufficient, it would hardly be fatal on that account.

In reference to the objection that the writ of attachment is not under the seal of the justice of the peace issuing it, it needs only be said that it has a scroll with the word "seal" written therein, in the *locus sigilli*. This circumstance, under one decision in *Whittington* v. *Clarke*, 8 S. & M. 480, was enough to establish the writ as being under seal.

The objection as to the variance between the declaration and bond is immaterial.

Judgment reversed, and cause remanded for further proceedings.

William Dowd et al. *vs.* James Hunt.

A judgment quashing a forthcoming bond after its return term, is a *nullity*; therefore where such a judgment has been entered, and afterwards the original judgment on which the forthcoming bond was given is amended, and another execution issues on the amended judgment and a second forthcoming bond is given; the amended judgment and second forthcoming bond will also be *nullities*, for the reason that the original judgment was extinguished by the first forthcoming bond, and that bond, notwithstanding the judgment of quashal, is still in full force and effect.

In error from the circuit court of Monroe county; Hon. F. M. Rogers, judge.

At the April term, 1845, of the circuit court of the county of Monroe, James Hunt recovered judgment against William Dowd, by default, for the sum of $1143.54 damages, besides costs. Upon this judgment an execution issued, returnable to the October term, 1845, which was levied on the property of the defendant, who entered into a forthcoming bond, with William

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F. Dowd as his security, for the delivery of the property upon the day of sale, and which was returned forfeited.

On the 28th day of October, 1845, the day on which the execution was returnable, William Dowd entered upon the motion docket of the court a motion to quash the said forthcoming bond.

At the April term, 1846, Hunt entered a motion to quash the execution and forthcoming bond, returnable to the October term, 1845, and on the 1st day of May, 1846, during that term, this motion was sustained. On the same day Dowd paid to the clerk of the court, and the clerk to the attorney of the plaintiff, the sum of $1192.23, and paid also $18.62½, the costs taxed.

At the same term, the defendant moved the court to amend the judgment of $1143.54, as entered up at the April term, 1845, and correct it by inserting the sum of $1308.87, the amount actually due upon the debt.

This motion was sustained on the 1st of May, and the judgment awarded accordingly.

Upon the judgment, as awarded, an execution issued, returnable to the October term, 1846; this execution was levied upon the property of William Dowd, who entered into a forthcoming bond, with the same security as before, which was returned forfeited. At the October term, 1846, the plaintiff moved the court to quash this execution and bond, which motion was overruled. To this opinion of the court the plaintiff tendered a bill of exceptions, and sued out this writ of error.

T. Coopwood, for plaintiff in error.

1st. The court below erred in sustaining the motion of plaintiff to quash defendant's forthcoming bond, made six months after the forfeiture and return of said bond. *Kenningham* v. *Scanland*, 6 How. Miss. R. 540; *Clow* v. *Thorpe*, 3 S. & M. 64; *Witherspoon* v. *Spring*, 3 How. Miss. R. 60; *Puckett* v. *Graves*, 6 S. & M. 384; *Bingaman* v. *Hyatt*, 1 S. & M. Ch. R. 437.

2d. The circuit judge erred in sustaining plaintiff's motion to quash the execution and forthcoming bond, after the payment, by defendant, of the execution upon the forfeited bond. *Davis* v. *Dixon*, 1 How. Miss. R. 64; *Weathersby* v. *Proby*,

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Ib. 98; *Bank of the U. States* v. *Patten*, 5 How. Miss. R. 200; *McIntire* v. *Weathersly*, 1 Ib. 331; *Minor* v. *Lancashire*, 4 Ib. 347; 5 Ib. 407.

3d. The court erred in sustaining plaintiff's motion to amend his judgment, after an execution was levied upon property of the defendant, and a forthcoming bond taken and forfeited, and so returned to the court. *Barnes* v. *Stanton*, 2 S. & M. 457; *Bank of the U. States* v. *Patten*, 5 How. Miss. R. 200.

4th. The court erred in overruling the motion of plaintiff in error, to quash the execution and forthcoming bond issued upon defendant's amended judgment. *Field* v. *Marsh*, 1 S. & M. 347; *Conn* v. *Pender*, Ib. 386; *Pender* v. *Felts*, 2 S. & M. 525; *Buckingham* v. *Bailey*, 4 S. & M. 538; *Bell* v. *Tombigbee Railroad Co.*, Ib. 549; *Bingaman* v. *Hyatt*, 1 S. & M. Ch. R. 437.

Guion and *Baine*, for plaintiffs in error.

1. The court had no power to amend the judgment, in the manner it did, after the expiration of the term at which it was rendered.

2. The court cannot amend judgment after it is satisfied, and this judgment was satisfied at the time it was amended.

3. The court had no power to quash the forthcoming bond, after the return term, for any purpose, as has been decided twenty times by this court; and of course it could not quash it for the questionable, not to say grossly illegal, purpose of amending a satisfied judgment, so as to put new life into it, and enforce it by execution against the parties. The action of the court in all that it did, in this matter, was not only erroneous, but it was absolutely null and void.

John Goodwin, for defendant in error.

1. It is immaterial what errors the court below committed in quashing the first bond and in amending the judgment, as the defendant there submitted to it without objection or exception.

2. No court was held at the return term of the bond, so that the April term, 1846, was the earliest period at which the plaintiff below could enter his motion to quash the bond.

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3. The payment of the money to the plaintiff's attorney below, was after the bond was quashed and the judgment amended; he cannot be permitted, by the trick of paying the money to the clerk, to take advantage of his own wrong, and thus defraud the plaintiff out of what is justly due to him.

4. The execution of the second forthcoming bond precludes all inquiry into the correctness of the amended judgment on which it was given; even if it were void, it cannot be looked into. *Bank of the U. States* v. *Patten*, 5 How. Miss. R. 200; 3 S. & M. 463.

Mr. Justice THACHER delivered the opinion of the court.

The state of case presented by this record is as follows: A judgment had been rendered upon which a *fi. fa.* issued, and a forthcoming bond was executed and forfeited. At a term subsequent to its return term, this bond was quashed, and the judgment upon which it emanated was amended. Upon this amended judgment, a *fi. fa.* issued and a forthcoming bond was executed, and at its return term, a motion to quash this bond and the execution was entered and overruled, and hence this writ of error.

The judgment quashing the first forthcoming bond, after its return term, was absolutely void, as we have repeatedly held. The judgment upon which it was based having been satisfied by the judgment derived from the forfeiture of that forthcoming bond, could not therefore be amended. The amended judgment was therefore also void. The circuit court should have quashed the second execution and bond, because they were based upon a void judgment.

The judgment is reversed, and this court directs a judgment to be entered sustaining the motion to quash the execution and bond emanating from the amended judgment.

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LAURENA WILLIAMS, Executrix of John Williams, deceased, *vs.* EBENEZER P. STRATTON, administrator of Shubal Foote, deceased.

Where an estate has been reported insolvent to the probate court, and an order made by that court, that the real estate shall be sold, the administrator thereof has by such order of sale become so far invested with the legal ownership, as to enable him to remove incumbrances on the real estate by bill in equity, and have the title perfected, so that the decree of sale may be carried out for the best interests of the estate and of the creditors.

F. bought of B. a lot of ground for $1000, paid half in cash, and gave his note, with S. as indorser, for the residue, and took a bond for title when his note should be paid; and left the bond with S. as his indemnity for the indorsement; F. died, leaving W. his executor, who sold the lot at private sale to D. for $1400, $500 of which was paid in cash, with which W. paid the note indorsed by S., and induced B. to make a deed of the lot to D., who, becoming dissatisfied with his bargain, cancelled the sale with W. by the agreement that W. should retain the $500 paid B., and should give up to D. his notes for the residue of the $1400 agreed to be paid, in consideration of which D. was to convey the lot directly to W. in his own right, which was done; *held*, on these facts, that the sale by W. to D. was void, and the conveyance by D. back to W. passed no title which could prejudice F.'s estate.

Nor would W., under such circumstances, be entitled to any equitable lien on the lot for the amount of the note indorsed by S. and paid to B.; for while a deposit of *all* the title-deeds, as a security for a debt created *at the time* the deposit is made, is generally recognized as constituting an equitable mortgage, yet in this case there was no evidence that S. delivered the title-bond left with him by F. to W. *as a security;* and if he did, W. delivered it to B. when the latter executed the deed to D., and the delivery up of the bond to B., would be, it seems, an abandonment of the equitable lien, if any existed, in favor of W.

Before an equitable mortgage will be sustained in equity, there must be clear and unequivocal proof of the intention to create the mortgage, and of the sum which the mortgage is to secure.

Where an executor sold a lot of his testator, and received on the sale a

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cash payment, and by contract with the vendee and the executor, the sale was rescinded, and the cash payment relinquished to the executor by the vendee as the condition of the rescission, and the executor had previously, with the cash payment thus made, taken up a prior incumbrance on the lot created by his testator, it was *held*, that the executor was not entitled to a lien on the lot for the repayment to him of the money thus received and paid out by him; the property of his testator was not a subject for speculation in the hands of his representative; he could make no illegal disposition of it, and then claim a benefit of his own wrong.

If minor heirs answer by a guardian *ad litem*, and the chancellor receive the answer of the guardian, as such, for them, the high court of errors and appeals will presume that the guardian had been regularly appointed for the purpose, though no order to that effect appear in the record below.

A decree of the chancery court, in relation to the realty of minors, which contains no saving clause as to their rights on arrival at age, is erroneous; but the decree being regular in other particulars, the high court of errors and appeals will protect the minors' rights by decree in that court.

It seems, that where certain persons, claiming property in their own right, are decreed to be trustees of the legal title for the use of others, the decree should require the former to make conveyance of that title to the latter; and is defective in not doing so, but will not be reversed therefor at the instance of those holding such legal title.

On appeal, from the decree of the vice-chancery court, held at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Ebenezer Stratton, administrator of Shubal Foote's estate, states, in his bill, that he had reported the estate of his intestate insolvent, and it had been so declared by the probate court of Yalabusha county. That in the year 1837, Foote died, having in his lifetime bought of A. S. Brown a certain lot, (described,) in the town of Grenada, for a price unknown to complainant, and had obtained a bond for title to it; at Foote's death $500 was due to Brown; that one John Williams, illegally obtained letters, testamentary or of administration, complainant, as the record of the probate court, was contradictory, could not tell which, on Foote's estate; after which, Williams sold this lot at private sale, to complainant, and George C. Waters and Robert L. Bingham, for about $1500, in three annual payments, of $500 each, and agreed that Brown should make them a title, which he did on the 25th of August, 1838; one of the conditions on which Williams agreed that Brown should make them a title,

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was, that they would pay Brown the residue due by Foote, which they promptly did before Brown made them a deed.

On the 5th of August, 1840, Williams was removed from his office, as executor, and all his acts declared void by the probate court; and, after his removal, with intent to defraud Foote's estate, he proposed to complainant, Waters and Bingham, that if they would convey to him the lot, and lose the amount they had paid Brown, he would release them from the payment of the residue of the purchase-money due by them for the lot, falsely representing that he had power to do so; town lots having depreciated greatly in value, they accepted his offer, and made Williams a deed to the lot and delivered them up their notes.

Williams afterwards died, and James Williams and Laurena Williams were appointed administrator and administratrix of his estate, took possession of the lot and had retained it ever since the first of March, 1841, renting it out at an annual rent of $150, refused to permit complainant to take possession of the lot, and thus prevent his making sale of it, or obtaining an order of sale, or paying the debts of the estate of Foote, whose property the lot is alleged to be.

Williams left four minor children, who, by name, are made defendants to the bill, together with his administrator and administratrix. The bill prays, that possession of the lot may be decreed to complainant as administrator; that the defendants, James and Laurena Williams, may be compelled to account for the rents of the lot, and for other relief, &c.

The infants answered by E. S. Fisher, Esq., their guardian *ad litem*; the record shows no appointment, by order of the court, of Fisher as such.

Laurena Williams answered by attorney; she states, that she is sole surviving executrix of John Williams's estate; that Shubal Foote borrowed $1000, or $1095 from the Manchester bank, and pledged the title-bond to the lot in controversy to Samuel Smith, his surety on the note, for the borrowed money; that on Foote's death, Smith was anxious to pay the money to the bank and keep the lot; that Williams, as executor of Foote, took

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advice of counsel to know how he could save himself in case he borrowed the money and paid the bank; he was advised, if he did so, to take the title to the lot, and if he could sell it for more than would repay him, to account to the estate for the balance. Williams, therefore, borrowed the money at heavy interest, from one N. Ingram, and paid the bank, and made *two* sales of it, both of which he was compelled to take back; the last time he received a sum of money for so doing.

She insists, that these are the facts of the case, and calls upon complainant to prove the statements of his bill.

William P. Bryan, a witness for complainant, stated that Foote bought the lot for one thousand dollars; five hundred paid in cash, the rest secured by note. This note was paid by the sale of the lot to Stratton, Waters & Bingham; the money paid by them being appropriated to its payment. That he had heard Williams so state, and also heard Williams say that he intended the lot for Foote's daughter, then in Texas; that he thought he could save that much from the estate. That Williams, in his lifetime, and Laurena Williams, his widow, since his death, had held and rented out the lot, which was worth from seven to ten dollars per month.

Hiram Pettybone, also for complainant, stated that Foote bought the lot of Brown for one thousand dollars; he made the first payment in the Commercial Bank of Manchester; five hundred dollars was paid in cash and the balance in twelve months, the last payment being made by Williams out of the payment by Waters, Bingham & Stratton to him, which on the rescission of the sale to them they gave up. That Williams and his widow had held possession of the lot.

Daniel Robinson, for complainant, stated, that he had heard Williams say that he had a deed for the lot, and when the estate paid him what it owed him, he intended to keep the lot for Foote's daughter, in Texas.

R. L. Bingham, also for complainant, stated that Foote died in 1837, and some time in 1838 Williams, as administrator of his estate, sold to Stratton, Waters, and the witness, the lot in controversy, for fourteen hundred dollars; five hundred paid in

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cash, and two notes for the residue, due in one and two years. When they bought of Williams, the title bond from Brown to Foote was in the hands of Samuel Smith, as collateral security, Smith having indorsed a note for Foote for the amount of five hundred dollars, due by Foote as his last payment on the lot; the cash payment of five hundred dollars was appropriated to the payment of the note on which Smith was indorser, to release the property from Smith, who required the note to be paid at maturity, or else he was to take the property for the $550. They bought at private sale, and obtained a deed from Brown. In 1840, they conveyed the lot back to Williams, he giving them up their two unpaid notes. Williams died in 1841, and held the possession of the lot before he died, after the rescission of the contract, and his widow after his death; the annual rent was worth seventy-five dollars per year. In answer to the cross-interrogatory, whether he spoke from his own knowledge or from information of others, he answered, principally from his own knowledge.

A. C. Baine, for defendants, testified that after Foote's death, Williams administered. Foote in his lifetime had given a note for $900 or $1000; he thinks $1000, to the Manchester Bank, with Samuel Smith as security, and delivered the title bond of the lot in controversy to Smith, to indemnify him as security, and to hold the lot absolutely, in case Smith had the money to pay; Foote being dead, and the property supposed to be worth more than the note, Smith wanted the note not to be paid, that he might hold the lot; in the meantime, Williams advised with the witness as to what he should do, and informed witness he could raise the money at heavy interest, and take up the note; witness advised him to do so, and told him the lot would always be security to him for the money and interest he might outlay for its redemption. Williams told witness, he thinks, that he had borrowed the money of Nat. Ingram, and taken up the note; Williams, with the note, took up the title bond from Smith. In the meantime property fell in value; Williams, being likely to lose, again consulted with witness, who advised him to sell the lot as his own, informing him if the matter was

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canvassed they would be obliged to repay him his advances and interest. Foote sold to Stratton, Waters and Bingham; but the witness was not very familiar with the circumstances of this sale, and of its subsequent rescission; he does not recollect from whom Foote purchased. The note given by Foote for the $1000 was given for the lot, and discounted by the Manchester Bank, or left there for collection. He derived his knowledge of the facts from the transaction itself, from Williams, Smith and the actors. He could give no dates to the transactions detailed by him; he does not think Foote paid any cash. Williams paid the note given by Foote at its maturity, to the bank. This he knows from both Williams and Smith, and from the fact that the latter wanted to pay it, and would have done so, if Williams had not. That Williams made the efforts he did make, to pay for the lot, under the belief that he could certainly sell it for more than the purchase-money, intending to give Mr. Foote's child the benefit of the advance, but when property fell he had to struggle to save himself.

The cause was referred to a commissioner, who reported that $471.50 was due for the rent of the lot, from March, 1841, to December, 1846. Upon which the chancellor decreed that the defendant, Laurena Williams, pay upon demand, to complainant, the amount of rent due; that the defendant deliver up the lot to complainant; that the conveyance from Brown and wife to Bingham, Waters and Stratton, and from them to Williams, be set aside, and for naught held, and the lot and improvements belong to the estate of Shubal Foote, and constitute a part thereof, subject to his debts; and that Laurena Williams pay the costs of the suit.

The defendants appealed.

E. S. Fisher, for appellant.

1. Foote's transferring the title-bond to Smith, to secure him against danger as security or indorser for the former, created an equitable mortgage to the latter, and gave him the right to call on the vendor for the legal title, on complying with the condition of the bond. 4 Kent's Com. 150; Coote on Mortgages, 84, 16 Law Library.

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2. When Williams paid off the liability of Smith, and took up the bond, he was substituted to Smith's equities, and acquired all the rights under the bond which Smith had acquired.

3. The complainant has no right to rents. Immediately after Foote's death the property descended to his heirs. Can an administrator recover rent from the heir at law? An administrator can assert no claim for rent against a third person, which he could not assert against the heir.

4. The bill as to the infants must be considered by the court as on demurrer.

Acee, for appellee.

1. The administrator of an insolvent estate had the right to proceed in equity to have the title to the realty perfected; the probate court could give no relief; adequate relief could be had only in equity. *Baines* v. *McGee*, 1 S. & M. 208; *Martin, Pleasants & Co.* v. *Glasscock*, 1 S. & M. Ch. R. 17-23; *Johnson* v. *Lewis*, 1 Rice's Eq. R. 40; How. & Hutch. 394, § 33; *Rogers* v. *Rogers*, 3 Wend. 503; *Tappan* v. *Cain*, 12 Johns. R. 120; *Huson* v. *Wallace*, Richardson's Eq. R. 1; *Pickering* v. *Bowles*, 1 Brown's C. C. 198.

2. The rents and profits of the realty, when an estate has been declared insolvent, belong no longer to the heirs, but to the administrator; they are but incidents, and follow the principal; that being assets, so are they.

3. The sale to Stratton, Bingham and Waters was void, being a private sale by an executor; no title passed, and none of course passed back to Williams. *Smith* v. *Denson*, 2 S. & M. 326; *Laughman* v. *Thompson*, 6 Ib. 259; *Worten* v. *Howard*, 2 Ib. 527; *Murphy* v. *Clark*, 1 Ib. 221; *Cable* v. *Martin*, 1 How. (Mi.) R. 559.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The appellee, Stratton, as the administrator on the estate of Shubal Foote, which had been reported insolvent, and an order made that the real estate should be sold, filed this bill to perfect the legal title to a lot in the town of Grenada, to which Foote in his lifetime had acquired an equitable title.

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Whether an administrator can, under such circumstances, claim to have the legal title to real estate perfected, is a preliminary question. Under different circumstances he could not of course. But on a deficiency of personal property, the probate court may decree a sale of the land, which, by law stands chargeable with the debts, in case the personal estate be insufficient. The sale is to be made by the administrator. Through him the proceeds of the sale, as assets, are to be administered. By the decree of sale the title of the heir is divested, and the administrator is so far invested with the legal ownership as to enable him to remove incumbrances, so that the decree of sale may be carried out for the best interests of the estate, and of the creditors. This being the case it becomes necessary to inquire whether the complainant in this bill has made out a proper case for the aid of a court of chancery.

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Foote, in his lifetime, purchased the lot of one Brown for $1000. He paid half in cash, and gave his note for the balance, and took a bond for title when the residue of the purchase-money should be paid. This bond Foote placed in the hands of Smith, who was his indorser, as a security or an indemnity. After Foote's death, John Williams took out letters testamentary, and whilst he was acting as executor, sold the lot at private sale for $1400, to Stratton, Waters and Bingham, and received from them a cash payment of $500, which sum, as most of the witnesses state, he appropriated in discharge of the balanee due Brown on the lot, and thereupon requested Brown to make title to Stratton, Waters and Bingham, which he did. Stratton, Waters and Bingham becoming dissatisfied with their bargain, agreed with Williams to rescind their contract of purchase, and to relinquish the $500 which they had paid, but their notes were to be delivered up, in consideration of which they agreed to convey the lot to Williams in his own right, and they accordingly made him a title. His letters testamentary were afterwards revoked, as having been improvidently granted.

On this state of things it is manifest that the sale by Williams to Stratton, Waters and Bingham, was void. It is equally clear that their conveyance back to him passed no title which

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could prejudice Foote's estate. The consequence is that Williams held the legal title as trustee for Foote's heirs, and since his death his heirs hold in the same way.

But here a further question arises in regard to a lien claimed for Williams. It is contended that he discharged the debt on which Smith was indorser, to secure which the title bond was deposited, and that he has a right therefore to be substituted to the equity of Smith.

It would be difficult to sustain such a lien as that claimed, either on the law of the case, or the proof. A deposit of *all* the title deeds, as a security for a debt created *at the time* the deposit is made, is generally recognized as constituting an equitable mortgage. Such equitable liens have met with very decided opposition in England, though they have been generally sustained, but it is admitted on all hands that they should not be extended beyond their present limit. Such a mortgage is in direct opposition to the statute of frauds, in regard to which we have said that we will create no exceptions not found in the statute. Lord Eldon said that in departing from the rule of the statute, there was no rule to go by; and it was essential that those who wished to render such securities valid should learn the utility of requiring two or three lines in writing. A transfer of these equitable mortgages may be made, but it must be done in the way they are at first created, by a deposit of the deeds as a security. See 3 Powell on Mortgages, 1050 – 1061. It is not necessary that we should hold such mortgages to be invalid in any case. The record does not furnish evidence that Smith delivered the title-bond to Williams to be held as a security. If he did so, Williams no doubt delivered it to Brown, the original vendor. He thereby parted with the deposit which constituted the mortgage, and did he not thereby part with the lien? No case has been cited in which such an equitable mortgage has been preserved to this extent. The equitable mortgage arises by the single act of deposit, and that act must be unequivocal. It differs very materially from a legal mortgage, which is transferred by the transfer of the debt, because it is an express lien, clearly and

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precisely defined by the written contract of the parties. It differs also from the lien of a vendor who gives a title-bond.

But apart from the question of law, there is some confusion in the testimony as to the actual payment by Williams of the money which is said to be the foundation of the lien. Bingham, who was one of the purchasers from Williams, states that when they purchased the lot, the title-bond was in the hands of Smith, as security for his indorsement on a note for $500, which had been given by Foote for the last payment of the purchase-money, and the $500 paid by him and his co-purchasers, were appropriated by Williams to the payment of that note. It was necessary that the note should be paid at maturity, to prevent Smith from holding the lot, which was then considered to be worth more money. This witness details the transaction with great precision, and concludes by saying that his statement is made from his own knowledge.

Bryan makes the same statement. He says that Foote purchased the lot of Brown for $1000; paid $500 in cash, and gave his note for the balance, which was paid by Williams with the money received from Stratton, Waters and Bingham for the lot. Pettybone confirms, in substance, the testimony of these witnesses.

A. C. Baine, who was examined for the respondents, states that the title-bond was deposited by Foote with Smith, to secure him for his indorsement on a note for $900, or $1000, he thinks the latter sum, and that Smith was anxious to take the lot, about which Williams expressed much anxiety, and stated to the witness that he could borrow the money at a high per cent. He states that Williams did borrow the money, he thinks from Ingram, and paid the debt. The note on which Smith was indorser, was discounted in the Commercial Bank of Manchester, for the benefit of the person from whom Foote purchased; or, that it was made payable there and deposited for collection. Mr. Baine obtained his information partly from Williams, Foote, and from his own knowledge of the transaction. It is possible Mr. Baine's memory may have failed him, in regard to the *minutiæ* of this transaction. There seems

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to be no doubt but what Foote gave $1000 for the lot, and paid $500 in cash, and gave his note for the balance. If the note was discounted in bank for the benefit of the vendor, from whom Foote purchased, it would seem that it could only have been given for $500; yet it is possible that Foote may have borrowed the first payment made by him, from the bank, and in this way become indebted in the sum of $1000. This supposition, however, rests upon conjecture. Smith could have explained this transaction, and so could Brown, and they should have been examined. There is too much uncertainty in the testimony about the sum paid by Williams, to sustain an equitable mortgage. Such a lien can only be established on clear proof. It seems certain that Williams paid $500, but that sum he received by the sale of the lot. For this he is not entitled to a lien. The property of a deceased person is not to constitute a subject for speculation in the hands of his representative. He can make no illegal disposition of it, and then claim a benefit from his own wrong.

It is objected that the decree was improper as to the minor heirs of Williams. They answered by their guardian *ad litem*, and we must presume, as the vice-chancellor received their answer, that a guardian had been appointed for the purpose. The decree contains no saving as to their rights; in that particular they may be protected by the decree of this court.

The decree seems to be defective also in this, that it does not direct that a title shall be made by Williams's representatives to Foote's heirs.

Decree affirmed.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE GRAND GULF RAILROAD AND BANKING COMPANY *vs.* THE STATE OF MISSISSIPPI.

Where the act of incorporation of a bank, reserved to the legislature a right to repeal the charter to a limited extent, leaving power to the bank to wind

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up its affairs, it was *held*, that the right to proceed against the bank by *quo warranto*, was not, if the legislature did not enforce its right under the charter, in any way impaired.

Under the construction of the act of 1840, prohibiting assignments by banks of their evidences of debt, placed upon it by the high court of errors and appeals of this state, a general assignment to trustees for the benefit of creditors, made by a bank, of its property and effects, since the law of 1840 referred to, would be void; yet, as the supreme court of the United States has reversed the decisions of the former court, and has given a construction to that act different from that given by the court of this state, the court of this state feels bound to conform to the decision, rendered on direct appeal, of the supreme court of the United States, and will hold such assignments *valid*.

Therefore, where a bank, since the act referred to of 1840, had made a general assignment of its property and choses in action to assignees for the benefit of its creditors, and, subsequently, proceedings, under the *quo warranto* act of 1843, were had against the bank, and a judgment of forfeiture rendered, and trustees appointed under the law, it was *held*, that the latter could take only what did not pass by the deed of assignment.

On appeal from the circuit court of Claiborne county; Hon. Stanhope Posey, judge.

Elbridge G. Walker, Esq., the district attorney for the third judicial district, filed an information under the law of 1843, against the President, Directors and Company of the Grand Gulf Railroad and Banking Company. The writ was issued without any affidavit. The bank plead its charter. It is not deemed necessary to set out more of the plea than relates to the remedy retained by the legislature, in case of a violation of the corporate franchises. It is part of the amendatory act of 1840, and is as follows, viz.:

"Nor shall it be lawful for said company at any time after the first day of January, 1841, to refuse or fail to pay on demand, in specie, any of its notes presented for payment now or then in circulation; and if said company shall at any time, now or hereafter, issue post notes, or notes payable at a future time as currency, &c., &c., ... or shall at any time after the first day of January, 1841, re-issue or fail to pay on demand, in specie, any of its notes presented for pay-

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ment, it shall be lawful for the legislature of the state of Mississippi, without the previous finding of the above facts, or any of them, by the verdict of a jury, or adjudged of by a court of competent jurisdiction, to amend or wholly repeal the charter of said company, and the several acts amendatory thereto, so far as the same confer banking powers; *provided, however*, that the corporate capacity of said company, and all the rights, privileges and powers to construct and continue a railroad, as designated in their charter, or in this or other acts amendatory thereto, shall enure and remain to said company and their successors and assigns forever; and *provided also*, that in case of the repeal of the banking privileges of said company, said company shall, notwithstanding, be enabled to sue for and recover and collect the assets and dues of said company, with a view to the settlement and closing their business as a bank."

Various replications were filed. The substance of them and of the rejoinders is as follows:

The first replication was, that the defendant, after entering upon the business of banking on the 1st February, 1842, became insolvent and unable to redeem its notes and evidences of debt in specie; and that it became insolvent by the fraud, neglect or mismanagement of its officers, and still continued so.

To this the defendant rejoined, it did not become insolvent and unable to redeem its notes, bills, &c., by the fraud of said defendant, or its officers.

The second and third replications aver, that the defendant, in February, 1842, became unable to redeem, and still continue unable to redeem its notes, bills, &c., in specie; and that it became unable to do so by the fraud, mismanagement or neglect of the defendant or its officers; and being unable to redeem in specie, it afterwards, to wit, on the 10th February, 1842, assigned and transferred to trustees for the benefit of its creditors, so much of its real and personal estate, and choses in action, as to disable it from continuing its banking operations, &c.

To these the defendant rejoined, it did not become insolvent and unable to redeem its notes, &c., in specie, by the fraud of

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defendant or of its officers; and that in and by the assignment mentioned in the replication, it was stipulated that the surplus, after payment of the debts mentioned therein, should be returned to defendant; and that ever since the making of said assignment, the defendant had continued to use the corporate franchises, in this, that it continued to sue in its corporate name — to defend suits — to pay taxes to the State in its corporate character — to elect its directory annually, &c. &c.

The fourth replication, states that the defendant, on the 10th February, 1842, transferred and assigned so much of its property and choses in action to trustees to pay its debts, as incapacitated it to continue its banking operations.

To this the defendant rejoined, the surplus in the assignment mentioned was by the terms of the deed to be repaid to the bank; and that after the assignment, the bank continued to use its banking privileges and corporate rights, by suing and defending suits, paying taxes, and annually electing its directory, &c.

To the rejoinders to the first four replications, the State demurred.

The fifth, sixth, and eighth replications, aver, that by two acts of the legislature, amendatory of the charter referred to in the pleas, the bank was compelled to pay specie; and avers, that these acts were accepted by the bank; and that after the 1st January, 1842, certain of its notes were presented for payment, and specie demanded, which was refused, &c.

To these replications the defendant demurred.

The seventh replication was, that the act of 1840 required all banks to pay specie after the first of January, 1842; and the defendant had failed to do so after that period.

To this the defendant demurred.

At the April term, 1846, the circuit court sustained the demurrer of the State to the rejoinders of the defendant, and overruled the demurrers of the defendant to the replication of the State; and accordingly adjudged the charter of the bank forfeited, and ordered its franchises, rights and privileges, to be seized into the hands of the State, and also appointed David M. Massie, William M. Randolph, and Ephraim A. McLean,

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trustees of the bank under the act; approved their bond, and ordered the bank "to deliver to the said trustees all the property, notes, bonds, and choses in action" of the bank.

The bank appealed.

George S. Yerger, for appellant, contended,

1. That the power of repeal given to the legislature formed part of the contract of the charter; and while the legislature might vary the mode of effecting the repeal, and subjecting the bank to a loss of its corporate privileges, it could not alter the contract as to the effect of the forfeiture, which was that the debts of the bank should be paid and its business settled up.

2. The replication, which relies on the assignment of the property of the bank to trustees as ground of forfeiture, is bad, because 1. If it be prohibited by the act of 1840, it is absolutely void, and so no assignment; and therefore not ground of forfeiture, even if an assignment were so; but 2. The making of an assignment by an insolvent bank is not at common law cause of forfeiture. 23 Wend. 581; 6 Gill & John. 375; 24 Pick. 49. To do that which a corporation is allowed to do, can never be cause of forfeiture of charter. Ang. & Ames. on Corp. 659.

3. The cases in New York in 6 Cowen Rep. and in *Slee* v. *Bloom*, 19 John. 475, are based upon the New York statute, and do not conflict with the position that the bank at common law has the right to make an assignment of its effects. Mr. Yerger reviewed the New York cases; and cited Ang. & Ames. on Corp. 658; 24 Pick. 49; 15 Ib. 361—366; *Slee* v. *Bloom*, 19 John. Rep. 475; 7 John. Ch. Rep. 217; Ang. & Ames on Corp. 659; 6 Cowen, 216.

H. T. Ellett, for appellee.

1. The refusal to pay specie for its notes on demand after January 1, 1841, as required by the charter, has been already held to be good ground of forfeiture. *Commercial Bank of Natchez* v. *The State*, 6 S. & M. 617.

2. That the bank became and continued insolvent and unable to pay its debts, and made an assignment of so much of its

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effects as to prevent it from continuing its business is also good cause of forfeiture, and is alleged to have occurred after the passage of the act of February 15, 1840. *Arthur* v. *Commercial and Railroad Bank of Vicksburg*, 9 S. & M. 394; *Grand Gulf Bank* v. *Archer*, 8 S. & M. 151.

3. All corporate franchises are granted upon the implied condition that they shall be executed according to the grant, and if the grantees neglect to perform the terms, the grant may be repealed. 3 Cruise's Dig. 307; Ang. & Ames, 510; 2 Kent's Com. 312; 2 Kyd, 474; 23 Wend. 233, 580; 9 Cranch, 51; 1 Bl. Com. 485.

4. It is a condition annexed to every bank charter, that the corporation shall continue to make discounts, receive deposits, issue notes, and redeem them in specie on demand — these being the objects for which the franchises are granted. *State* v. *State Bank*, 1 Blackf. 275, 276.

5. If a corporation do, or suffer to be done, any act which renders it unable to answer the end and object for which it was created, it is a forfeiture of its charter; and continued insolvency, and refusal by a bank to redeem its notes, and the assignment of so much of its effects, as to make it incapable of continuing its operations, are such acts. 1 Spear's L. Rep. 485; *Slee* v. *Bloom*, 19 Johns. 456; 6 Cowen, 215, 219; Ang. & Ames, 419; 23 Wend. 204, 205, 233, 583, 584, 585; 5 Iredell, 307; 1 Blackf. 275, 276; 6 S. & M. 623; *Arthur* v. *The Assignees of the Vicksburg Bank*, MS.

6. The State has not waived its right to prosecute an information to take away the charter, by the amendment reserving the right to repeal the charter for a breach of any of the provisions of that section. Acts of 1840, p. 49. The reservation of the right of repeal for the causes specified, does not impair or interfere with the right of the State to prosecute an information for the same cause, — the remedies being cumulative. 23 Wend. 243, 244; 6 S. & M. 621; *Planters Bank* v. *The State*, 6 S. & M. 628; Archb. Cr. Pl. 2; 2 Hale, 191; 1 Russell on Cr. 47, 48; 1 Saund. R. 135, n. 4; 2 Yerger, 472; 6 Bac. Ab. 373.

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Mr. Justice CLAYTON delivered the opinion of the court.

This case is, in most respects, like the *quo warranto* cases heretofore determined in this court.

The remedy reserved to the legislature in this act of incorporation, to repeal the charter to a limited extent, leaving power to the bank to wind up its affairs, must be regarded as cumulative. If not enforced by the legislature, the right to proceed by *quo warranto* is unimpaired.

Previous to the institution of the proceedings in this case, the bank had made a general assignment of its property and effects. Under the construction of the act of 1840, prohibiting assignments by the banks, heretofore placed upon it by this court, such assignment was void. But the supreme court of the United States has reversed the decision of this court upon that point, on the ground that the act of 1840 was unconstitutional. In cases of that character, that court bears the relation of an appellate tribunal to this, and we feel bound to conform to its construction of the constitution of the United States, when made upon direct appeal from this court. Of consequence the right of the assignees under this deed of assignment set forth and admitted in the pleadings, is paramount to that of the trustees appointed by the court, upon the rendition of the judgment of forfeiture. They could take only what did not pass by the deed of assignment.

The judgment of the court below must be reversed, and must be so modified as to embrace only the property, estate and effects of the bank, not contained in the deed of assignment. The judgment so modified will be entered in this court.

Judgment reversed.

ANN COOR and GEORGE M. BARNES, Administratrix and Administrator of John Coor, deceased, *vs.* SOLOMON GRACE.

In an action of assumpsit on the common counts for money loaned, the written acknowledgment of the defendant, that he has received a specified sum

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from the plaintiff, in consideration of which he sells him a slave, the sale to be void on the repayment of the money at a specified time, is competent evidence to sustain the count.

Such writing proved the loan of the money, and an undertaking to secure its repayment, and in the absence of any proof of an actual repayment, or of the delivery of the slave by the defendant to the plaintiff, the plaintiff made out a *prima facie* case, on which the jury did right to find for him.

In error from the circuit court of Copiah county; Hon. Thomas A. Willis, judge.

Solomon Grace, on the 25th of March, 1840, sued Ann Coor, administratrix, and George M. Barnes, administrator of John Coor, deceased, in the common counts in assumpsit on an open account for $554, for money loaned, due on the 25th of June, 1839. The defendants plead *non assumpsit* by their intestate. A trial was had at the November term, 1846, and the jury rendered a verdict for plaintiff for $925. The defendants moved for a new trial, which being refused, they took a bill of exceptions; from which it appears that the plaintiff introduced before the jury two witnesses, who stated that they knew nothing of any loan of money from plaintiff to defendants; he then, with the permission of the court, read this instrument of writing to the jury:

"*The State of Mississippi, Copiah County.*

"This indenture, made and entered into between John Coor, of the state and county abovementioned, of the first part, and Solomon Grace, of the second part; witnesseth, that the said John Coor, for and in consideration of the sum of five hundred dollars, to him in hand paid by the said Grace, at and before the delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and bargained, and by these presents doth grant, bargain, and sell unto the said Grace, his executors, administrators and assigns, a certain negro boy, named Allen, aged thirteen years, to have and to hold the said negro hereinbefore granted, bargained and sold, or mentioned, or intended so to be, unto the said Grace, his executors, administrators or assigns forever. *Provided always*, and these presents are upon these conditions, that if the said Coor, his executors

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or administrators, shall pay, or cause to be paid unto the said Grace, his executors, &c. the sum of five hundred dollars, with interest on the same, on or before the first day of January next; then these presents and every matter and thing herein contained shall cease, determine, and be utterly void to all intents and purposes; or otherwise to remain in force. In testimony whereof, I hereunto set my hand and affix my seal.

"JOHN COOR."

"*May* 21*st*, 1838."

The defendants objected to the introduction of this writing as evidence; the objection being overruled, they excepted. No other testimony was offered on either side.

The defendants below prosecute this writ of error.

D. W. Adams, for plaintiffs in error.

1. It does not appear whether Grace retained the slave or not; but it is plain a *conditional sale* was intended, which had the legal effect of a mortgage, and the party's remedy was by enforcing his lien on the slave.

2. A party cannot recover in assumpsit when there is a special agreement subsisting, unless that agreement is declared on. *Fowler* v. *Austin*, 1 How. (Mi.) R. 156.

3. A new trial should have been granted on the ground of the introduction of improper and irrelevant testimony; or on the still stronger ground, that there was no evidence whatever. See *Crockett* v. *Young*, 1 S. & M. 241; *Barringer* v. *Nesbitt*, 1 Ibid. 22; *Tunstall* v. *Walker*, 2 Ibid. 638; *Foster* v. *Shaw*, 7 Serg. & Rawle, 156.

E. G. Peyton, for defendant in error.

1. The instrument of writing not being *under seal* could not have the effect of a mortgage; had the *seal* been to it, as was intended, Grace might have maintained *debt* upon it for the money, and the deed would have been evidence of it; or he might have foreclosed his mortgage in equity.

2. Not being under seal, *assumpsit* could be maintained, and

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the writing is evidence of the *indebtedness* intended to be secured by a specific lien on the slave.

3. The instrument is not a conditional sale, but simply a security for the repayment of the money at a specified time.

4. It was sufficient to put the defendants upon proof of the repayment of the money, or that Grace had the slave; in the absence of any such proof, the verdict was right.

5. The doctrine in relation to declaring on special agreements does not apply to a case like this, where the contract is executed and the compensation is to be in money; in such case, a recovery may be had in *indebitatus assumpsit.*

Mr. Justice THACHER delivered the opinion of the court.

Grace sued John Coor's administratrix and administrator in assumpsit on an account for money loaned their intestate. The proof adduced by Grace was a writing signed by the intestate, in which he acknowledges the receipt from Grace of five hundred dollars, in consideration of which he sells him a slave, which sale was to be void on the repayment to Grace of the above-mentioned sum at a specified period. The introduction of this writing as evidence, was competent in the common count in assumpsit to show the fact of a loan of money, and made out a *prima facie* case for the plaintiff. It proved the loan of the money and an undertaking to secure its repayment. In that state of the evidence, it was incumbent on the defendant below to have shown an actual repayment of the money, or a delivery of the slave to Grace, in order to rebut the legal presumption made by the plaintiff. But the defendant in the circuit court made no defence whatsoever, and consequently the jury were warranted in their finding. The court did not err in refusing a new trial.

Judgment affirmed.

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Thomas C. Thornton et al *vs.* John Fitzhugh.

If mesne process be not executed at least five days before the return day of the writ, and objection thereto be not made in the court below, it cannot be entertained in the high court of errors and appeals; and it seems that such objection can only be taken in the court below by plea in abatement to the writ.

If the return term, to which mesne process has been executed, fail, so that no court is held at that term, such term will nevertheless constitute the appearance term of the case, which will stand for trial at the next term in the same way as though the appearance term had been regularly held.

Under the imparlance law of 1840, the return term of the writ and the return term of the action is that term wherein the writs in the action are all returned served, or at which all the parties have entered an appearance.

In error from the circuit court of Rankin county; Hon. Morgan L. Fitch, judge, presiding.

John Fitzhugh sued Thomas C. Thornton and James B. C. Thornton, on a note for one hundred and twenty dollars. The declaration was filed on the 27th of November, 1844; the writ issued on the same day returnable to the first Monday of December, 1844; and was executed on the day of its issuance. The defendants filed the plea of *non assumpsit* to the December term, 1844. At the June term, 1845, there was a jury and verdict for plaintiff. The bill of exception recites that the writ was returnable to the December term, 1844, which by law commenced on the 2d day of the month; that no judge attending at that term, the court was not opened and there had been no term held until the then June term. The defendants claimed a continuance, the plaintiff insisted the cause was ready for trial, and the court refused to continue the case and ordered a trial, to which the exception was taken.

Mayes, *Clifton* and *Mayes*, for plaintiff in error.

1. The writ having been executed less than five days before

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the court, the defendant had until the next term to plead, even if the court had been holden. H. & H. 577.

2. That the writ issued on the 27th and court sat on the 2d of the following month, this was not five days *before* the return day, and the statute is explicit that it shall be executed *at least five days before the return day.* Ibid.

3. No court being held in December, the June term was the term for pleading. Acts of 1840, p. 132. No steps could have been taken to prepare the case for trial at the December term; no provision of the statute could have been complied with; in fact there was *no December term. Maury* v. *Commercial Bank of Natchez*, 5 S. & M. 41.

William and *William G. Thompson*, for defendant in error, contended that the continuance was properly overruled and the judgment legitimately rendered, and should stand.

Mr. Justice THACHER delivered the opinion of the court.

The writ in this case bears test of the June term, 1844, of the Rankin circuit court, and was made returnable to the December term, 1844. It was executed on the 27th day of November, 1844; and the first Monday of December, the first day of the December term, fell upon the second day of that month. It is here contended that the process was not executed at least five days *before* the return day thereof. In the first place, this objection was not taken in the court below. In the next place, in that court, the objection should have been made by plea in abatement. How. & Hutch. 576, § 3; *Hurst* v. *Strong*, 1 How. 123.

Secondly, at the following term, the defendants below pleaded *non assumpsit*, and claimed a continuance by virtue of the act of 1840, ch. 74, regulating the practice of the circuit courts. It appears by the bill of exceptions that the previous term, that of December, was not held on account of the non-attendance of the judge. The court overruled the motion. The objection to the writ not having been made seasonably or in the proper mode, we can look to it to ascertain what was the return term

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in view of the act of 1840. In giving an interpretation to that act in the case of *Maury & Sessions* v. *Commercial Bank of Natchez*, 5 S. & M. 41, we have said that the return term of the writ and the return term of the action is that term wherein the writs in the action are all returned served, or at which all the parties have entered an appearance. In the present case, the writ was executed upon both the defendants to the December term, which, according to that decision, constituted the December term the return term.

Judgment affirmed.

18 440
74 56

10s 440
192 766

ROBERT RABE *vs.* JARED D. FYLER.

The special court of justices established by the statute for the trials of forcible entry and unlawful detainer, is under the power conferred, by the constitution, on the legislature to establish such inferior courts as might be deemed necessary, a constitutional tribunal.

Objections not made in the court below will not be heard in the high court of errors and appeals; and defects not pointed out by adverse counsel at the trial below, will be considered as having been waived.

R. being the tenant of a bank, the latter conveyed by deed the premises occupied by R. to F. and H. as trustees; R. refusing to deliver the premises to F., one of the trustees; at the expiration of his tenancy, F. brought an action individually for an unlawful detainer against R.; and on the trial, read the deed from the bank to H. and himself, by which the property was conveyed to F. and H. in joint tenancy as trustees: *Held*, that *the right of possession* being one of the points in controversy in this proceeding, the deed was properly admitted in evidence to enable the jury to determine that right.

One joint tenant of property may, in his own name, maintain the action of unlawful detainer against one in possession of the property; in such action the question of *title* is not involved, but merely that of *possession*; and the possession of one joint tenant being in contemplation of law the possession of both, a recovery by one in this action would enure to the benefit of both; and the pendency of the action by one, or the judgment in his favor, might be pleaded to a proceeding by the other for the same cause

On the trial of an unlawful detainer by F. against R., the plaintiff asked the court to instruct the jury that if they believed that R. was tenant of B., and B. assigned the premises to F. and H. with authority to collect the rent,

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and F. gave R. notice of this assignment and authority, and he made no objection, the jury have a right to find that R. was tenant of F.: *Held*, that the instruction was properly given.

In an action of *unlawful detainer* it is not necessary, if the defendant has disclaimed the relation of tenant, for the landlord to prove any demand of possession before suit brought; a disclaimer is equivalent to a demand and refusal.

Nor, it seems, will the defendant in such action, who has by his plea denied the plaintiff's right and litigated his claim, be permitted to object the want of a demand; yet if no demand of possession were made before action brought, and the defendant had, when demand was made by the suit, offered to deliver up possession when the suit was served, or when the plea was filed, he might have been entitled to his costs.

It was in proof, in an action of unlawful detainer, that the defendant was the tenant of one B., who had assigned the property to the plaintiff, and that the plaintiff had informed the defendant of the transfer, and that he must pay rent to him as his landlord, to which the defendant did not object: *Held*, that before the defendant could rely upon the statute of limitations of *three years*, it was incumbent on him to show when, if ever, his possession assumed *an adversary character*, as the statute would only commence running from that period.

In error from the circuit court of Adams county; Hon. Stanhope Posey, judge.

On the 26th March, 1845, Jared D. Fyler made complaint before a justice of the peace, that "Robert Rabe, unlawfully and against his consent, withheld from him the possession of a lot of land, with livery stable and dwelling-house thereon, with appurtenances (describing them,)" and thereupon the justice issued a warrant against Rabe, to answer the complaint, returnable before the justices of the county at the court-house. The complaint was tried before a court composed of three of the justices; the jury there impanelled found in favor of Fyler; Rabe appealed to the circuit court of Adams county; where the following issue was made, to wit: "Jared D. Fyler, by attorney, complains that Robert Rabe unlawfully and against his consent withholds from him the possession of a lot, &c., (described in the warrant) whereof he prays restitution," &c. to which Rabe replied, — "Defendant says he does not detain, as alleged above, and this he prays may be inquired of by the

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country." At the November term, 1846, of the circuit court, a trial was had, and verdict and judgment again rendered for Fyler; Rabe moved for a new trial on these grounds: 1st, "because the verdict of the jury and the judgment is against law and the evidence in the cause: 2d, the court erred in the instructions given to the jury on the application of the plaintiff: 3d, the court erred in permitting illegal evidence to be given to the jury on behalf of the plaintiff." The court overruled the motion, Rabe excepted, and from the bill of exceptions these facts appear: The plaintiff proved by reading deed from one Patterson, as trustee, and by other testimony, that the premises in controversy were sold at public auction on Monday, the 22d day of March, 1841, under this deed of trust, to the Agricultural Bank of Mississippi for $11,263, and were delivered into possession of the bank by the defendant on the 29th March, 1841, and Rabe agreed to hold the same as tenant of the bank. Fyler then offered to read a deed, from the record book of deeds, from the Agricultural Bank to Jared D. Fyler, the plaintiff, and Thomas Henderson, as trustees, dated the 24th day of August, 1842, which embraced the property in controversy, and which recited in substance that, whereas, the bank was indebted to James Brown, of the firm of Brown, Brothers and Co., and also to other persons in the mode and to the extent pointed out in the deed, to secure their respective debts, and for other purposes recited in the deed, the bank "granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto Jared D. Fyler and Thomas Henderson, of the city of Natchez," a large amount of property, including that in controversy in this case. "Together with all and singular the appurtenances, hereditaments, privileges and advantages, unto the aforesaid premises and every parcel thereof appertaining or in any wise belonging, and also all the estate, right, title, interest, property, claim, and demand whatsoever, either at law or in equity of them, the said parties of the first part, of, in and to the same. To have and to hold the above granted, bargained and described premises with the appurtenances unto the said parties of the second part, their successors

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and assigns forever: In trust, however, and to and for the uses and purposes following, viz.: 1st. That the said parties of the second part shall and may let and rent the real estate hereinbefore conveyed or intended to be so; also collect and receive the rents, issues, and profits of said property, and every portion hereof, as well the rents now due and unpaid, as those to become due." The deed proceeded to enumerate thirteen *special trusts*, conferred on Fyler and Henderson, including the power of sale among other things in certain contingencies. Rabe objected to this deed; the record does not show for what reason; the objection was overruled. Solomon Scott, a witness for Fyler, stated that Fyler was the acting trustee under the deed from the bank; that he (witness) had become a clerk of the Agricultural Bank in June, 1844. As clerk of the bank, he had carried to the credit of Fyler, as trustee, a sum of $200 paid into bank by one Robertson for the defendant Rabe, which was paid before he entered the bank (as appeared from the books of the bank) on account of rent of the premises in question. The payment was made after the deed from the bank to Henderson and Fyler, but he did not know of any authority to Robertson, or why he paid it. He further stated that after the deed from the bank to Fyler and Henderson, this witness, as agent for Fyler, called upon Rabe at the stables, the premises in question, and told him of the conveyance to Fyler, and that Fyler was his landlord, and that he must pay the rent to him; that Rabe made no objection. Afterwards he wrote notes to Rabe, and called upon him for the rent for Fyler, and as Rabe refused to pay and denied the right of Fyler to claim and collect the rent, this action was brought. On cross-examination, he stated that Rabe had paid no rent to him for the premises, nor could he say that he had ever promised to pay any, nor had he answered his notes. McCullough, a witness for plaintiff, stated on cross-examination, that Rabe was the occupant of the stables, for some years before he held of the bank; that the only possession that he had any knowledge of Rabe's taking under the bank was his agreement to hold the premises as tenant of the bank; this was all the testimony on either side. The plaintiff

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then moved the court to instruct the jury as follows, to wit: "If the jury believe, from the testimony, that Rabe was the tenant of the bank, and the bank assigned the premises to Fyler and Henderson with authority to collect the rent, and Fyler gave Rabe notice of this assignment and authority, and he made no objection, the jury have a right to find that Rabe was tenant of Fyler," which instruction the court gave as asked, and the defendant prosecuted this writ of error.

Sanders and *Price*, for plaintiff in error.

1. The circuit court had no jurisdiction of the case, if the justices' court had not. The constitution of this state limits the jurisdiction of justices of the peace to causes in which the principal of the amount in controversy shall not exceed fifty dollars. Art. 4, § 23, Const. The judicial power of this state is vested in one high court of errors and appeals, and such other courts of law and equity as are provided for in the constitution. There is not any court therein provided for composed of justices of the peace, save only as to their civil jurisdiction where the principal in controversy does not exceed fifty dollars. *Carmichael* v. *Davis*, Walk. Rep. 222.

2. The deed from the bank to Henderson and Fyler could not be read as evidence to the jury; 1, because the question of title was not in controversy; it was of a mere right of possession, where there was no dispute about boundary; 2, the deed was one to which Rabe was neither party nor privy; 3, the deed itself was not proven, the absence of the original not accounted for by affidavit or otherwise; 4, the deed does not empower Fyler and Henderson to sue for the possession of the property; it is only a power, without being coupled with any interest, to collect the rents, and to sell in certain contingencies, and to appropriate the proceeds to pay certain debts, if not otherwise paid.

3. The instruction was improperly given; because there is no evidence that Rabe ever in any manner recognized Fyler as his landlord, or himself as his tenant; 2, the contrary is expressly shown, that he was the tenant of the bank, and

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therefore could not in law attorn; 3, an assignment to collect rent does not change the tenure; 4, a tenancy cannot be attorned by silence, it requires action — a substantial movement, by an express agreement to deny his landlord, and to recognize or hold under another.

4. It was not shown anywhere that Rabe ever refused to give possession, or that any demand thereof was ever made of the premises in controversy; a refusal to pay rent is not a refusal to yield possession, nor is the denial of the right of a party to collect rent a refusal to give possession.

5. It is shown, by the evidence of McCullough, that Rabe had been in possession prior to the purchase by the bank and ever since, which is far beyond three years, the time allowed for suing out this remedy; the suit was therefore barred by the statute of limitations.

6. If Fyler had the right of possession, it was a joint one with Henderson, and one joint tenant cannot maintain the action.

Eustis, for defendant in error.

1. The reading of the deed from the bank to Fyler and Henderson was proper and competent as part of the proof of right of possession; it carries a right of occupancy, without raising any question of title, if the occupancy was previously in the bank.

2. The charge given on the part of the plaintiff was correct. The Virginia statute is like ours. The case of *Allen* v. *Gibson*, 4 Rand. 468, decides expressly that "one tenant in common may have his remedy for the whole land against any party having no right whatever without joining his co-tenant."

Mr. Justice CLAYTON delivered the opinion of the court.

This was a proceeding originally tried before two justices of the peace for an unlawful detainer. A verdict and judgment were rendered for the plaintiff, and on appeal to the circuit court, there was a similar result.

We will proceed to consider the several objections urged in argument to this judgment.

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First, it is insisted the trial before the justices was unconstitutional. The right of the legislature to establish such inferior courts as might be deemed necessary, has been more than once upheld by this court. See *Thomas* v. *The State*, 5 How. 20; *Houston* v. *Royston*, 7 How. 543. The same rule is applicable to this specially-created tribunal.

The next objection is to the reading of the deed from the bank to Henderson and Fyler. No specific objection was made to the deed in the court below, and no defect pointed out. It is now said, it should be excluded, because a copy from the probate court office was read without accounting for the absence of the original. This court has laid down the rule in very strong terms, that unless the objection to testimony be specific in the court below, it shall not, with very few exceptions, prevail in this court. *Doe* v. *Natchez Ins. Co.* 8 S. & M. 205. Many defects might be at once removed, if they were pointed out at the trial, and the party will be considered to have waived all such if he does not make them known. It is farther said, that as the title to the property was not in dispute, in this proceeding, the deed should, for that reason, have been excluded. One of the issues submitted was, whether the plaintiff had the right of possession. The deed was proper to enable the jury to determine that right. Again, it is said, the deed was to Fyler and Henderson jointly, and could at most be evidence in a joint proceeding by them. The deed made them as trustees joint tenants of the property. The possession of one was the possession of both, in contemplation of law. Adams on Eject. 100; *James and wife* v. *Rowan*, 6 S. & M. 402. Hence a recovery in this form of action by one, would enure to the benefit of both, and the pendency of the judgment might be pleaded to a proceeding by the other for the same cause. The deed is not the foundation of the action, but is mere evidence of the right of possession, title not being involved in the controversy.

The charge of the court was, in our view, free from error. If Rabe, when informed of the conveyance to Fyler, that Fyler was his landlord, and that he was to pay the rent to him, made no objection, the jury was authorized to infer that he thence be-

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came the tenant of Fyler, as he had previously been of the bank, which conveyed to Fyler.

In regard to the objection, that no demand of possession was made before suit brought, none was necessary. A disclaimer is equivalent to a demand and refusal. The suit was a demand; if Rabe had offered to deliver up possession when the writ was served, or when the plea was filed, he might have been entitled to his costs, if no previous demand was made. The plea was a denial of the plaintiff's right, and amounted to a refusal; and after litigating the matter, he cannot now object the want of demand.

As to the statute of limitations of three years, it is not shown when the possession became adverse. Rabe was clearly the tenant of the bank; when informed of the transfer of the property to Fyler, and that he must pay rent to him as his landlord, he did not object. The possession at that time was not adverse. It was incumbent on him to show when, if ever, the holding assumed an adversary character, the statute would only commence running from that period. Having failed to do this, the finding of the jury was correct, and the judgment is affirmed.

EDWIN R. SMITH *vs.* SAMUEL CRAIG ET AL.

The probate court has no jurisdiction of a petition for the partition of lands held in coparcenary, joint tenancy, or tenancy in common, except it be for the division of the lands of a deceased person amongst his heirs under the statute (How. & Hutch. 412, § 89,) or in case of the *death* of one joint tenant, tenant in common, or coparcener, and the descent of his lands to his minor heirs, under the law of 1833, ch. 46, § 1.

The probate court has no jurisdiction, and can have no jurisdiction, except it falls under either one or other of the heads of jurisdiction conferred by the constitution, matters testamentary and of administration in orphans' business and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compotes mentis*.

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Smith v. Craig et al.

The act of 1833, ch. 29, § 2, which provides "that the powers and jurisdiction heretofore invested in the presiding justices of the county courts by an act entitled 'an act concerning the partition of land held by coparceners, joint tenants and tenants in common,' passed 10th June, 1822, shall pertain to and be invested in the judges of probate of the several counties of this state; and that all matters and proceedings which by virtue of said act were required to be recorded in the clerk's office of the county courts, shall be regularly recorded in the office of the clerk of the probate courts of the counties respectively where such proceedings shall be had," confers no power or jurisdiction whatever on the *probate courts;* if conferred at all, it is conferred upon the probate *judge personally,* and if the legislature could give it to him, he has the power to order partition.

Appeal from the probate court of Tippah county; Hon. R. R. Thomas, judge.

Edwin R. Smith filed his petition in the probate court against Samuel Craig, to effect the sale of a lot of ground in the town of Ripley, which he alleged he and Craig held as tenants in common by virtue of a purchase of the same by them under execution against the Mississippi Union Bank; the sheriff's deed being to them jointly; and that the lot was incapable of division.

Craig answered, denying the co-tenancy with Smith; insisting upon the right of himself and N. S. Price, Esq., to ownership of the lot, and denying all claim of Smith.

Smith filed an amended petition, making Price a party, and asserting his former claim.

Price answered, setting up his co-tenancy with Craig, denying all ownership or right in Smith, and insisting that he and Craig were in possession, their possession being adverse to Smith; and that the probate court had no power to settle the conflicting claims.

Under the view taken of the case by this court, it is not deemed necessary to notice the pleadings further. The probate court dismissed the suit for want of jurisdiction, because of the conflict of title; and Smith appealed.

John W. Thompson, for plaintiff in error, made several points on the effect and nature of the defences set up in the answers

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to the petition of the plaintiff in the court below, and discussed them at length. He contended, further, that the probate court had jurisdiction of the subject-matter by express enactment. He cited North on Probate Courts, 257, §§ 15 and 16.

Potter, on same side.

N. S. Price, for defendant in error, contended that under the statutes of this state the probate court could not decree a partition of lands where there was controversy about the title and conflict as to possession. It could only be done by mutual consent. How. & Hutch. 420, § 118; Ib. p. 353; Ib. p. 356, § 58.

McNutt and *Paxton*, on same side.

1. The power of the probate judge to make partition of lands between coparceners, joint tenants or tenants in common, is given by the act of 1822. See H. & H. Dig. 353, §§ 48–54, 61, and the act of 1833, H. & H. Dig. 471, § 14.

2. These acts give the probate judge no power to settle conflicting claims, but confine his jurisdiction to cases where the possession is joint and undisputed between the parties before the court. If there has been an actual ouster, and adverse possession is held by one or more of the parties, his jurisdiction does not attach, and the parties must settle their conflicting claims by ejectment at law or by bill in chancery, as the case may require. See *Clapp* v. *Bromigham*, 9 Cow. 530–565.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Smith presented his petition to the probate court, as joint owner of a house and lot with Craig, and prayed, as the same could not be equally divided, that an order of sale might be made according to the statute. Craig answered, and admitted that they were joint purchasers of the lot at sheriff's sale, but denied Smith's right to have partition or sale, because of his want of possession, and because Craig claimed a right to the lot, having, as a creditor of the original owner, redeemed or offered to redeem of Smith. He also stated that he had sold an

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undivided half to Price, whereupon a supplemental petition was filed, by which Price was made a party. The court dismissed the petition for want of jurisdiction.

The law on which this case must depend, is, we think, free from just grounds of doubt. We find that the statutes on this subject have been modified, and the question is, how does the law now stand?

The act of 1822 conferred power on the judges of the supreme court, the chancellor and the presiding justices of the county courts to make partition of lands held by coparceners, joint tenants, or tenants in common, in the manner therein prescribed. The next act on the subject is that of 1833, (Acts of December, 1833, 29, sec. 2,) which provides "that the powers and jurisdiction heretofore invested in the presiding justices of the county courts, by an act, entitled "an act concerning the partition of land held by coparceners, joint tenants, and tenants in common," passed 10th June, 1832, (which is a mistake in date, and should have been 1822,) shall pertain to and be invested in the judges of probate of the several counties of this state, and that all matters and proceedings, which, by virtue of said act, were required to be recorded in the clerk's office of the county courts, shall be regularly recorded in the office of the clerk of the probate courts of the counties respectively where such proceedings shall be had." This act seems to do nothing more than to substitute the judge of probate for the presiding justice of the county court. This was not a power or jurisdiction vested in the county courts, which consisted of three judges, but it was conferred on the presiding justice, just as it was on the judges of the supreme court, and the chancellor, by special commission, and not as a matter cognizable in their respective courts.

The law in relation to the estates of decedents, provides for a division of the land amongst the heirs. H. & H. 412, sec. 89. And if the land cannot be divided it shall be sold. Ibid. 409, sec. 79. The act of December, 1833, contains a further provision for the partition of land amongst joint tenants, tenants in common and coparceners, or rather for the sale of land so held

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when it cannot be divided. Act of December, 1833 – 46, sec. 1. This act evidently applies only to cases in which, by the death of a joint tenant, tenant in common, or coparcener, his land may descend to his minor heirs. It provides that the proceeds of sale shall be divided between the parties interested therein *and the representatives of a deceased* party. It is an act, moreover, amendatory of the law in relation to last wills and testaments, and of administration. These last mentioned acts give jurisdiction to the probate courts, but they evidently apply only to the land of a deceased person.

The only laws then on the subject of partition are the two first mentioned, and they confer power only on the persons therein named. The judge of probate has the power to order partition, if the legislature could give it to him, but the probate court has not such *jurisdiction;* it was not given to it by the constitution, which confers on it jurisdiction in all matters testamentary, and of administration in orphan's business and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis.* This application for partition falls under neither of these heads. What seems to be conclusive on this subject is, that the law of 1822 gives a party dissatisfied with the partition, made according to its provisions, a right to have the matter reëxamined by bill in chancery, thus referring the matter for review to that court to which it primarily belonged, as a branch of its concurrent jurisdiction. In a case like the present, where division cannot be made, the remedy was in chancery alone, where compensation could be decreed. This statutory proceeding is a substitute for the common law writ of partition, which did not issue from the courts which possessed similar jurisdiction to our probate courts, but from the common law courts.

Another provision of the statute of 1833, from which this jurisdiction is claimed for the probate court, may be mentioned as showing the meaning of the legislature. It directs that the proceedings in partition, which by the previous law were to be recorded in the office of the county court, should be recorded in the office of the clerk of the probate court. Such a direction

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would have been wholly unnecessary, if it had been deemed a matter of jurisdiction with the court. Then it would have been the duty of the clerk to record the proceedings had in such cases, under the general law regulating his duty on that subject.

If then partition be not a matter pertaining to the jurisdiction of the probate court as a *court*, no appeal or writ of error can be taken, and the case is improperly brought up. The court had not jurisdiction of the subject-matter.

This point was not raised by counsel, but it is one which cannot be overlooked, as it lies at the foundation of our right to decide the case.

It is probable that this reason did not operate on the mind of the court below in dismissing the case for want of jurisdiction. The controverted state of the title or right seems to have been the reason on which the court refused to take jurisdiction. In this we might differ with the court, but we cannot reverse a correct judgment, although it may have been given on a wrong reason.

The question of partition was before this court in the case of *Ingram* v. *War*, 5 S. & M. 746. The attention of the court was not then directed to this question of jurisdiction in the probate court, probably for the reason that it could have no application in that case, as the land had descended to one of the claimants, and there were minor heirs. It was clearly a case within the jurisdiction of the probate court, and we mention it merely in order to point to the distinction. We then dismissed the petition on the merits of the case.

Judgment affirmed.

HANNAH A. WRAY, Executrix of John F. Wray, deceased, *vs.* JOHN DOE ex dem. HO-YA-PA-NUBBY.

By statute of this State, (How. & Hutch. 605,) copies of records appertaining to land offices, duly authenticated, are made evidence; in an action of ejectment, therefore, by an Indian claiming under the sixth article of the Chickasaw treaty, the certificate of the register of the land office of the

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district, showing the date of the location of the Indian on the land in dispute, is competent evidence.

In an action of ejectment by an Indian claiming under the sixth section of the Chickasaw treaty, which provides that "reservations of a section each shall be granted to persons male and female, not being heads of families, who are of the age of twenty-one years and upwards, a list of whom, within a reasonable time, shall be made out by the seven persons hereinbefore mentioned, and filed with the agent, upon whose certificate of its believed accuracy, the register and receiver shall cause said reservations to be located upon lands fit for cultivation, but not to interfere with the settlement rights of others," — the Indian having shown the reservation and the location on the land in controversy, it was held not to be necessary for him to show that a list including himself was furnished by the seven chiefs and filed with the agent; nor to produce the agent's certificate of its believed accuracy furnished to the register and receiver prior to the location; the location in itself was evidence that all the prerequisites were complied with.

The presumption of the correctness of official action is a general one, and applies to most acts of an official or a ministerial character.

Under the sixth section of the Chickasaw treaty, the term "*reservation*" is equivalent to an absolute grant; and it needs only the *location* of the land to give the reservation identity, to make the title in the reservee absolute and complete; and where, after such location, the general government issues a patent to the same land to a third party, the patent will be wholly *void*, even at law.

In an action of ejectment by an Indian claiming under the sixth section of the Chickasaw treaty, it is not competent for the defendant to show what certificate was appended to the roll of the reservees returned by the chiefs and agent to the register's office, when it appeared that the name of the Indian plaintiff was in that list; the Indians had done all in their power to secure their reservations by having their names put upon the roll; if the agent afterwards neglected his duty, by failing to annex a proper certificate to the roll, the Indian is not to be prejudiced thereby.

The instructions from the war department as to the construction of the Chickasaw treaty, have no binding force; that department could add nothing to the terms of the treaty without the consent of the other; and as the sixth section contained the positive stipulation that the reservations should be located by the register and receiver, the instruction from the war department, "that no location under any of the articles of the treaty should be considered as final, or as conferring any right whatever until the same should be approved by the president," is not obligatory.

Under the eleventh article of the Chickasaw treaty, the *residue* of the Chickasaw country, after the reservations were taken and located, was the only portion which could be sold, as public lands of the United States.

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In error from the circuit court of Pontotoc county; Hon. Hugh R. Miller, judge.

John Doe, on the demise of Ho-ya-pa-nubby, on the 9th of September, 1845, brought an action of ejectment against John F. Wray, for section sixteen, township nine, range five east, in Pontotoc county. At the March term, 1847, the jury found a verdict for the plaintiff; a new trial was moved for and refused; and exceptions sealed.

From these it appears that after the jury were impanelled, the plaintiff read the following certificate to them, viz.:

"COPY"

"*Reservations under the sixth article of the Chickasaw treaty.*

"Roll, No.	Reservee.	Sec.	Town.	Range.	Date of location.
"620	Ho-ya-pa-nubby.	16	9	5 E.	June 29th, 1838.

"*Register's Office,*
"Pontotoc, Miss.

"I, Andrew J. Edmondson, register of the land office of the United States at Pontotoc, Mississippi, do hereby certify that the above is a true copy from the list of persons furnished by Benjamin Reynolds, Chickasaw agent, on the second day of November, 1838, to the register and receiver of Indians entitled to land under the sixth article of the treaty between the United States and the Chickasaw Indians, and of the location of Ho-ya-pa-nubby and all of said list that relates to said Indian, Ho-ya-pa-nubby, as the same remains of record in my office. Given under my hand this 18th day of March, 1846.

Andrew J. Edmondson,
Register of said office."

This was objected to, but the objection overruled.

The defendant then admitted his possession of the premises in controversy, and the plaintiff closed his case.

The defendant then read to the jury patents in his favor, dated October 9th, 1845, issued by the general government to the land in controversy, signed by James K. Polk; and also the certificates of entry of the land.

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He then introduced Edmondson, the register of the land office at Pontotoc, and proved by him the advertisement of the public lands for sale in Pontotoc county, in the newspaper, by the government. The defendant then asked the witness "if there was any, and, if any, what certificate, appended to the roll of the reservees returned by the chiefs and agent to the register's office?" The witness, on the objection of the plaintiff, was not allowed to answer the question.

The testimony here closed; and on motion of the plaintiff the court instructed the jury: 1. That the sixth article of the treaty made between the Chickasaw Indians and the United States May 24, 1834, passes to such Indians as are described in said article a title in fee to one section of land, and that the title to such land passed as effectually by said article as if a grant had been executed.

2. That the Indians' title is conferred by the treaty, and that a location is only necessary to give identity to the land, and when the location is made as contemplated by the 6th article of the treaty, the title is consummated and becomes perfect.

3. No patent or further grant than is contained in said article, is necessary to confer a complete title on the Indian.

4. The location of a Chickasaw Indian, twenty-one years of age or upwards, not being the head of a family, on a section of land, conferred on such Indian a complete and perfect title to said land.

5. Under the treaty, the chiefs of the Chickasaw nation have the sole and exclusive right to determine what Indians are entitled to land, under the 6th article of such treaty.

6. The enrolling or placing the name of the plaintiff on the list of persons entitled to land under the 6th article of the treaty, by the chiefs, and his location by the register and receiver, on a section of land, is conclusive evidence of his being entitled to land under said article, and also of his title to such section of land.

7. The location of a reservee under the Chickasaw treaty on a section of land vests in such reservee a title to said land, which cannot be divested by any act of the government of the United States, or of any of its officers.

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8. That a sale of a section of land previously designated as the location of an Indian reservee, under the Chickasaw treaty, by order of the president of the United States, or any officer of the government, would be unlawful and void.

9. If the plaintiff was located as a reservee, under the 6th article of the treaty, on the land in controversy in this suit, a subsequent sale by the government of the United States was unlawful, and the patents issued as evidence of such sale are void, and no evidence of title.

10. If the jury believe, from the testimony, that the plaintiff has established in himself a title to said land in controversy, under the 6th article of the Chickasaw treaty, then the government of the United States had no title to said land, and could convey none to the defendant, by patent or otherwise.

The defendant asked the court to instruct the jury, 1. That the plaintiff must recover on the strength of a perfect title, and not on the weakness of the defendant's. This was given.

2. That the plaintiff claiming under the treaty, and relying on that for his title, must show affirmatively that he has complied with its provisions to entitle himself to their benefit, and that nothing is to be presumed against the possession of the defendant. This was refused.

3. That the plaintiff must show affirmatively that the commissioners mentioned in the treaty made a list of the plaintiff's name to the agent, and that he certified its accuracy to the register and receiver, and that they located the plaintiff on the lands in controversy, or that those officers, after the plaintiff had done all he was required to do, refused or neglected to discharge their duty. Refused.

4. That the certificate of the register, read by the plaintiff to the jury, unexplained by the proof, showing and explaining the manner of the figures and abbreviations in said certificate, is not evidence of the location on the lands in controversy. Refused.

5. A patent is the highest evidence of title; it is evidence that all prerequisites have been complied with, and cannot be questioned, either in a court of law or equity, unless it be on the ground of fraud or mistake; and a mistake cannot be set up in this court. Refused.

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6. The court and jury are bound to know, judicially, that the president issues his proclamation to sell public land, and that under the treaty, after the public sale is over, the lands thus offered for public sale, are subject thereafter to private sale. This was given.

John F. Wray prosecuted this writ of error; but died before the cause was submitted in this court. The suit was revived in the name of Hannah A. Wray, his executrix and devisee.

T. J. Word, for appellants, contended,

1. That the 4th article of the treaty, declaring the Indians capable of managing their own affairs, and the treaty containing no provision like the Choctaw treaty, that its terms were to be construed most beneficially for the Indian in all questions of doubt, it was incumbent on the appellee to bring himself fully within *all* the provisions of the treaty.

2. He should show, 1st. That he was enrolled in a reasonable time by the chiefs, and his name furnished by them to the agent. 2d. That the agent should certify to the register and receiver that he believed the list thus furnished him by the chiefs was accurate. 3d. That the register and receiver should have located him upon the particular lands claimed.

3. There is no sufficient evidence of location; it is not shown who located the Indian, nor by what authority; it was not done *after* the register and receiver had received a certified list of Indians from the agent, for that was not received until November 2, 1838; and the alleged location took place in *July*, 1838; the name of this Indian found its way to the books of the register and receiver, through the 12th article of the treaty. 7 U. S. Stat. at Large, 454. The chiefs refusing to place his name on the list, he applied in person to the register and receiver, who sent his name up to the department for further direction, with the land marked opposite his name; it was thus reserved from sale to await the action of the chiefs and the agent, and the approbation of the proper authorities at Washington.

4. It being the duty of the president to order these lands to

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be sold, as other lands of the United States, all the laws directing the mode of sale and conferring power on the president to prescribe rules and regulations therefor, apply to these lands; hence the instructions to the register and receivers, in relation to these locations, subject to the approval of the president. 7 U. S. Stat. at Large, 470. This location not being approved, the land was advertised for sale, as shown by the proclamation. Pub. Land Laws, Part II. p. 214, No. 150.

5. The instructions given by the court were erroneous; they assume that it was proven that a location was made out; all the instructions assume facts to be proven, and are not believed to be justified by the proof.

6. A decision for the lessor of the plaintiff draws funds from the general Chickasaw fund, and appropriates land to a particular individual, who is also interested in that general fund; the Indian's application was made in June, 1838; he went west with his tribe; the government of the United States (his agent in the matter) sells his land to a citizen of this state, and passes his money to the general Chickasaw fund, and has confirmed the sale by the issuance of patents; thus showing the government's view that it was common, and not individual property. See 9 S. & M. 130.

Miller and *Edmondson*, for defendant in error.

1. By the language of the 6th article of the treaty a title in *fee* passed to those who are embraced in its provisions. *Niles* v. *Anderson*, 5 How. (Mi.) R. 365; *Newman* v. *Plummer*, 4 Ib. 522.

2. The certificate was properly admitted in evidence, and the presumption is, that the chiefs and the agents complied with the requisitions of the treaty. *Newman* v. *Plummer*, 4 How. (Mi.) 522.

3. The treaty gave the title; the location identified and completed it. 5 How. (Mi.) R. 525; *Coleman* v. *Tish-ho-ma*, 4 S. & M. 40. A patent was not necessary. *Strother* v. *Lucas*, 12 Peters, 412, 437, 448.

4. The patent to the defendant below was null and void;

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the title to the land previous to its issuance being in the plaintiff below. *Stoddard* v. *Chambers*, 2 How. S. C. R. 285; *Wilcox* v. *Jackson*, 13 Pet. 498; *New Orleans* v. *United States*, 10 Pet. 663; *Stark* v. *Marther*, Walk. R. 181; *Hit-tuk-ho-mi* v. *Watts*, 7 S. & M. 363; 2 How. S. C. 317; *Grignon's Lessee* v. *Astor*, Ib. 344.

5. The copy of the certificate was competent testimony. How. & Hutch. 605, § 24; *Harris* v. *Newman*, 3 S. & M. 565.

6. The instructions asked and given are sustained by the following authorities: *Niles* v. *Anderson*, 5 How. (Mi.) 365; 4 Ib. 522; 4 S. & M. 40; *Wilcox* v. *Jackson*, 13 Pet. 499; *Comegys* v. *Vasse*, 1 Pet. 212; *Stoddard* v. *Chambers*, 2 How. U. S. R. 285; *New Orleans* v. *United States*, 10 Pet. 663; *Hit-tuk-ho-mi* v. *Watts*, 7 S. & M. 363.

7. The abbreviations in the certificate are common, well understood, and needed no explanation. *Puckett* v. *Planters Bank*, 5 S. & M. 470.

In further reply to the argument of Mr. Word, counsel for the defendant in error made these points:

1. The treaty requires the list of reservees to be filed with the register and receiver, and it thereby becomes a part of the records of their office.

2. The treaty does not prescribe any particular form or mode of keeping the records of the land-office, and any informality in the mode adopted cannot prejudice the rights of the plaintiff in error. The form adopted appears to be as convenient and appropriate as any other. *Bagnell et al.* v. *Broderick*, 13 Peters, 449.

3. The register certifies that the copy contains all that relates to the enrolment and location of the defendant in error. It is not pretended that the records of the land-office contain anything more in relation to this Indian; if they did the plaintiff in error might have procured a copy. It is only necessary for the defendant in error to prove that he was located. The presumption is that he was properly enrolled; otherwise the register and receiver would not have located him.

4. There was no error in the court sustaining objection to question by defendant below, asking the register if any certifi-

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cate was appended to the list furnished by the agent. The list, or a copy of it, ought to have been produced, which would have spoken for itself. It was clearly incompetent to prove by parol whether a certificate was appended or not. Even if it had appeared that the agent had failed to annex his certificate to the list returned, as required by the treaty, — his neglect could not prejudice the right of the defendant in error. *Coleman* v. *Tish-ho-ma*, 4 S. & M. 40.

5. The treaty does not require that the location of an Indian, by the register and receiver, should be approved of by the president, or any other power acting under him, or in any other capacity. This will be seen by a reference to the articles of convention between the government of the United States and the Chickasaw Indians. 7 U. S. Stat. at Large, 450.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of ejectment in the circuit court of Pontotoc county, in behalf of the Indian, for a section of land, claimed as a reservation under the 6th article of the Chickasaw treaty. The same land has been purchased of the government, at a sale of the public lands, by Wray, and a patent obtained therefor. The whole question is, whether the Indian reservee has preference over the subsequent patentee.

The portion of the treaty which gives rise to the claim of the Indian, is in these words: "Reservations, of a section each, shall be granted to persons, male and female, not being heads of families, who are of the age of twenty-one years, and upwards, a list of whom, within a reasonable time, shall be made out by the seven persons hereinbefore mentioned, and filed with the agent, upon whose certificate of its believed accuracy, the register and receiver shall cause such reservations to be located upon lands fit for cultivation, but not to interfere with the settlement rights of others." 7 U. S. Statutes at Large, 450.

The reservation was secured before the date of the patent, and has preference over it, if the location was properly made. On this point the only evidence is the certificate of the register of the land-office at Pontotoc, showing that this Indian was located upon the land in dispute, in June, 1838. This certifi-

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cate was objected to, and the objection overruled; in which we perceive no error. By statute of this state, copies of the records appertaining to land-offices, duly authenticated by the proper officer, are made evidence. How. & Hutch. 605. The evidence establishes a location prior to the grant issued to the defendant, in the court below. But it is insisted, that it is not shown that the requisite preliminary steps were taken to authorize the location, as it is not shown that a list, including this Indian, was furnished by the seven chiefs, and filed with the agent, and his certificate of its believed accuracy furnished to the register and receiver, prior to the location.

This evidence was not necessary. The location is in itself evidence, that all the prerequisites were complied with. A violation of duty on the part of the officers who made the location, cannot be presumed. A grant raises a presumption that all prerequisites have been complied with. *Polk's Lessee* v. *Wendell*, 5 Wheat. 293; *Bagnell* v. *Broderick*, 13 Peters, 449; *Newman* v. *Harris and Plummer*, 4 How. (Mi.) R. 522. The principle is a general one, and applies to most acts of an official or a ministerial character.

In regard to the title of the Indian under this clause of the treaty, this court has already said, "a title in fee passed, by this language, to the reservee. The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if a grant had been executed. The title was conferred by the treaty; it was not however perfect, until the location was made; location was necessary to give it identity. The location, it seems, was duly made, and thus the title to the land in controversy was consummated, by giving identity to that which was before unlocated." *Niles* v. *Anderson*, 5 How. (Mi.) 383. A similar construction has been been placed upon the Choctaw treaty. 4 How. (Mi.) 555; *Doe* v. *Coleman*, 4 S. & M. 46.

In this case the location was made in June, 1838. The treaty gave the title, the location fixed the spot, and gave identity to it. The right thus became complete at that day.

The advertisement of the sales at which Wray purchased, excluded from sale "the lands selected as reservations under

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the provisions of the treaty." The subsequent patent issued to him for the same land was *void*, and might be so regarded even at law. When the reservation was selected, the land was *reserved* from sale, and a patent for it was wholly *void*. See 7 S. & M. 366; 2 How. S. C. R. 317, 344. It interposed no obstacle to the recovery of the plaintiff below.

In the progress of the trial, the defendant below propounded a question to the witness Edmundson, which was excluded by the court, and which forms one ground of exception. The interrogatory was, "whether any, and, if any, what certificate was appended to the roll of the reservees returned by the chiefs and agent to the register's office." The exclusion of this testimony was correct. The Indians had done all in their power, to secure their reservations, by having their names put upon the roll. If the agent afterwards neglected his duty, by failing to annex a proper certificate to the roll, before he returned it to the register's office, the Indian is not to be prejudiced thereby. *Coleman* v. *Doe*, 4 S. & M. 46. The certificate of the register showed, that the Indian was included in the list furnished by the chiefs and the agent to the register.

The instructions from the war department, as to the construction of the treaty have no binding force. One party to the treaty could add nothing to its terms, without the consent of the other. The treaty had a positive stipulation that the reservations under the 6th section should be located by the register and receiver. The instruction referred to in argument, provides "that no location under any of the articles of the treaty, shall be considered as final, or as conferring any right whatever, until the same shall be approved by the president." 2 Public Land Laws, Instructions, &c. 215. The rules of the department as to the mode of carrying the treaty into execution, and for the guidance of the officers of the government, not trenching upon the rights of the parties, would be considered obligatory. But the department could impose no new condition upon the reservees. The only class of cases in regard to the location of which, any discretion was granted to the secretary of war, was the reservation of orphan claims, in the 8th article.

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The *residue* of the Chickasaw country, after the reservations are taken and located, was the only portion which under the treaty could be sold, as public lands of the United States. Art. XI.

It is unnecessary to pass in review the several instructions given and refused, by the court below. They were evidently prepared with much skill and care, and were well calculated to call forth a decision upon the merits of the controversy. We have examined them carefully, and are of opinion that each was correctly decided.

No error is perceived in any of the proceedings, and the judgment is affirmed.

JOHN D. WYATT *vs.* WILLIAM BEATY.

By the act of 1844, regulating the liens of judgments and decrees, it is provided, in the 6th section, that judgments thereafter or theretofore rendered shall cease to be liens unless entered upon the "judgment roll," when the lien shall be from the enrolment; by the 14th section it is provided that the act shall not operate upon judgments theretofore rendered until after the first of July, 1844, nor upon those thereafter rendered until sixty days after its approval; *held* to be the true construction of the act; that all judgments rendered before the act, or within sixty days after its approval, if enrolled at any time before the first day of July, 1844, retained the order of priority which appertained to them before its approval, and derived no priority from an earlier date of enrolment prior to the first day of July, 1844.

Where two judgments were obtained on the same day, against the same defendant, prior to the enrolment law of 1844, and both enrolled, but on different days; and on the judgment latest enrolled the plaintiff issued an execution and made some money; *held*, that the execution on which the money was made was entitled to it.

ON appeal from the circuit court of Yazoo county; Hon. Robert C. Perry, judge.

Berry Nall, use of John D. Wyatt, obtained a judgment against William H. Courtenay on the 14th day of February,

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1838, for $2,416.63, a forthcoming bond on which was forfeited on the 30th day of April, 1838. On the 3d day of June, 1844, the original judgment and the judgment on the bond were duly enrolled. No execution issued on this judgment after its enrolment.

On the 24th day of February, 1838, Rufus Bean recovered a judgment for $347.02 against the same person, a forthcoming bond on which was forfeited on the 30th of April, 1838; on the 16th day of June, 1844, this judgment and the bond were also duly entered on the judgment roll of the county. On the 24th day of April, 1845, execution issued on this judgment, directed to the coroner of the county, and was by him levied on a lot of land, as the property of Courtenay, on the 28th day of April, 1845, and returned not sold for want of time. On the 26th day of June, 1845, a *venditioni exponas* issued, under which the land was sold, on the 20th of October, 1845, for $525.

The coroner, on this state of facts, moved the circuit court for instructions as to the appropriation of the money. The circuit court ordered it to be appropriated in satisfaction of the judgment of Rufus Bean. Wyatt appealed.

R. S. Holt, for appellant, contended,

1. That by the 6th and 14th sections of the enrolment law, the liens of all judgments rendered before the enactment of that law ceased, on the first day of July, 1844, to operate and date from the rendition of the judgment, and from that day became dependent upon a new event, viz. the enrolment of the judgment, and dated from the time of the enrolment.

2. That the constitutional right of the legislature to make such a law is founded on the same principles as the right to enact any other statute of limitations.

N. G. and *S. E. Nye*, for appellee.

1. If this case be considered under the law as it existed prior to the enrolment law, the judgment below is correct; for the judgments being of the same day were of the same age. *Burney* v. *Bogett*, 1 How. Miss. R. 391; and the creditor whose exe-

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cution first issued would have priority, *ib.*; or the money being made on this judgment of Bean, that will be entitled to it. *Com. Bank of Manchester* v. *Coroner of Yazoo Co.*, 6 How. Miss. R. 530.

2. The enrolment law, which in all its parts we believe thoroughly constitutional, does not affect this conclusion; the 6th and 14th sections, when construed together, as they must be to retain the lien of judgments rendered prior to its passage, if duly enrolled, as they were before; and they are not affected by the date of enrolment, if made before July 1, 1844.

3. If any other construction of the law of 1844 prevail, and especially if that prevail contended for by appellants, the law itself is unconstitutional and void, as impairing rights previously vested. 3 Story's Com. on Const. 242, 250–251; *Ogden* v. *Saunders*, 12 Wheat. 284; *Sturgis* v. *Crowninshield*, 4 Wheat. 200.

Mr. Justice THACHER delivered the opinion of the court.

This was a motion by the coroner for instructions how to appropriate a sum of money which came to his hands by a sale of real estate under a *venditioni exponas*. The two judgments were of even date, the 30th day of April, 1838. One was entered upon the judgment-roll of the circuit court on the 3d day of June, 1844, upon which no execution issued. The other was entered upon the judgment-roll on the 16th day of June, 1844, and execution issued, by virtue of which the sale took place, and the money levied.

The inquiry is, as to the effect of the act of 1844, ch. 8, approved February 24th, 1844, entitled "an act to amend an act entitled an act to regulate the liens of judgments and decrees, approved 16th February, 1841, and for other purposes."

The 6th section of this act provides that any judgments or decrees theretofore rendered or thereafter to be rendered, shall cease to operate as liens upon property until the same shall be entered on the "judgment roll," and the lien shall be from such enrolment, instead of from the rendition of the judgments or decrees.

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But the 14th section of the same act provides that the act shall not operate upon judgments and decrees theretofore rendered, until after the first day of July, 1844, nor upon those thereafter rendered, until sixty days after its approval.

Our interpretation of this act is, that all judgments and decrees rendered before the approval of the act, if enrolled at any time on or before the first day of July, 1844, retain the order of priority which appertained to them before its approval, and that they do not derive a priority from an earlier date of enrolment previously to the first day of July, 1844; and that the same principle controls, in judgments and decrees rendered within sixty days after the approval of the act.

The judgment of the circuit court, appropriating the money first to the satisfaction of that judgment upon which execution and *venditioni exponas* issued, was correct.

Judgment affirmed.

WALTER B. LUCAS *vs.* LOCKHART, FEARNE AND DONNEGAN.

Although the language of a will may make an absolute gift, yet if other appropriate expressions be used which show with sufficient certainty, that but a qualified gift was intended, a court of equity will look to the clear intention of the testator, and raise a constructive trust where none has been declared.

But the words of recommendation or of hope used by the testator, must be certain, 1. as regards the objects to whom such terms are applied; 2. the subjects of property given must also be certain; the words are then imperative and create a trust.

L., by the first clause of his will, devised his whole estate, real and personal, to his wife during her widowhood; by the fourth clause, he declared that "during my wife's widowhood, she is to have the entire use, profits and control of my estate, and to her discretion do I intrust the education and maintenance of my children during that time;" and this clause further proceeded to provide for the maintenance and education of the children "out of the profits" of his estate, in case of the death or marriage of his widow: *Held*, that the language of the will imperatively commanded that the children should be educated and supported, and set apart a specific fund

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for that purpose; the widow, therefore, took the estate coupled with this trust, and, in consequence, it was not liable while the children lived, to be sold to satisfy judgments against the widow.

In such case, if the widow will not protect the property of the estate when levied on under execution against her for her own debts, it is the duty of the administrator with the will annexed, to do so; the property being still the estate of the testator, subject to a charge in favor of his heirs, the administrator being the representative of the estate, is a joint trustee with the widow, and may interpose his claim by trial of the right of property to prevent the trust from being defeated.

In error, from the circuit court of Noxubee county; Hon. A. B. Dawson, judge.

Lockhart, Fearne and Donnegan obtained a judgment on the 21st of October, 1844, against Mary A. Longstreet and Hutchinson Dent; an execution thereon was levied on certain slaves as the property of Mary A. Longstreet; Walter B. Lucas, administrator *de bonis non* with the will annexed of James Longstreet, interposed his claim to the property; an issue was made up to try the right.

On the trial, it was proved by the plaintiff in execution, that all the slaves levied on, except two, had been in possession of Mrs. Longstreet for ten years anterior to the judgment, those two at the time of the levy were in the possession of Lucas.

The claimant then introduced a copy of James Longstreet's will, made on the 4th of March, 1830, and probated in Richmond county, Georgia.

The clauses bearing on this controversy were in these words; "*First.* I give my whole estate, both real and personal, to my wife during her widowhood.

"*Second.* Should my wife die before my youngest child now born, or which may hereafter be born, shall attain the age of sixteen years, it is my will that my whole estate be kept together by my executors, until such youngest child shall arrive at that age; and that then my whole estate be divided equally between them; should my wife marry before my youngest child attains the age of sixteen, it is my desire that the estate be kept together, as aforesaid, by my executors, until such child shall reach that age, and that then the whole be equally divided be-

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tween my wife and such of my children as may be then living, &c., &c.

"*Third.* The bequests hereinbefore made to my wife are understood and intended by me to be in lieu of dower.

"*Fourth.* During my wife's widowhood, she is to have the entire use, profits and control of my estate, and to her discretion do I intrust the education and maintenance of my children during that time; but in case of her death or marriage before the time appointed for a division, as aforesaid, then it is my desire that my children be all supported, and that the girls under sixteen, and the boys under eighteen be as well educated out of the annual profits of my estate, as they will allow up to the time of division, the profits to be first applied to their support; and in case of a deficiency, then to educate all the children embraced in the last clause, the balance to be applied in educating the younger in preference to the older children."

By the last clause, he appointed his wife, Mary Ann Longstreet, his brother, Augustus Longstreet, and his son, William Longstreet, executors.

It was proved, that the defendant, in the execution, was the widow of James Longstreet, still unmarried, that there were children of James Longstreet living; that the slaves levied on were the property of Longstreet at his death; and that Lucas had duly qualified as his administrator.

This being all the proof, the claimant asked the court to instruct the jury;

1. That the will of James Longstreet does not provide and vest in Mary A. Longstreet any estate in the property embraced in it, which is subject to be seized and sold under execution at law.

2. That if Mr. Longstreet had an interest or estate which might be taken and sold in execution at law, after it had vested, yet the plaintiffs in execution were bound to show, that distribution and delivery of the property had been made by the executors or administrators before the levy was made; until this is done, the executors or administrators had a right to hold the property in administration and for administration.

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3. That the property named in the will could not be levied upon on execution against Mrs. Longstreet, and held against the administrator, unless it were shown that the property had gone into her hands by distribution, or with the administrator's consent.

These instructions were refused and exceptions taken.

The jury found for the plaintiff in execution; and the claimant prosecuted this writ of error.

A. W. Dabney, for appellant, contended,

1. That an estate, during widowhood, in slaves, could not be sold under execution at law; to allow it, would often result in entire loss of the property to the remainderman. The proper mode would be, to subject it in chancery.

2. By the first and fourth clauses of the will, Mrs. Longstreet had only a qualified interest in the property, clothed with the trust to support and educate the children. The title is not in her, but in the executors, or, since their resignation, the administrator, *c. t. a.*, whose duty it is to protect the estate. *Hall* v. *Cushing*, 9 Pick. R. 395–408; *Langley* v. *Hall*, 11 Pick. R. 120–124; *Carenhaven* v. *Schuler*, 2 Paige, 132; 2 Sto. Eq. 413.

3. It is immaterial whether the legal title be in the claimant, as administrator, or in Mrs. Longstreet, as trustee, the rights of the children are the same; the burden of proof is on the plaintiff to show the property, subject to the execution. *Thornhill* v. *Gilmer*, 4 S. & M. 153.

4. The instructions were improperly refused; a legacy, whether general or specific, does not vest without the assent of the executor. 2 Lomax on Ex. 128.

A. C. Baine, for appellees,

1. As to the true construction of the will, cited and commented on 2 Black. Comm. ch. 3, marg. p. 19; Ib. p. 41; *Jones* v. *Colbeck*, 8 Ves. 42; Chilton on Prob. p. 108, § 4; and contended, that in any construction of the will the legal title was in the widow, no title whatever in the administrator, and he could not be heard to interpose his claim.

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2. Admitting the slaves were held, coupled with a trust, they were still subject to the execution. Mr. Baine cited *Thornhill* v. *Gilmer*, 4 S. & M. 153, and reviewed it and contended that it was not law, and was overthrown by 1 Porter (Ala.) R. 175–184, and *Talbot* v. *Melton*, 9 S. & M. 9. The claimant who has made a false claim, and in fraud, should not be permitted to set up an outstanding title in another.

Henry Gray, on same side.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This case originated out of a trial of the right of property, in which the jury found the issue for the plaintiffs in execution, who are defendants in error. The claimant predicates his right on the provisions of the will of James Longstreet, on whose estate he is administrator, with the will annexed. The execution was against the widow of James Longstreet, and Hutchinson Dent. If by the will Mrs. Longstreet had an absolute life estate in the slaves levied on, the judgment must stand; but if the property was subject to a trust or charge in favor of the children of Longstreet, then it cannot be reached by an execution at law.

The clauses of the will which raise the question are the following: "First, I give my whole estate, both real and personal, to my wife during her widowhood."

"Fourth, during my wife's widowhood, she is to have the entire use, profits, and control of my estate, and to her discretion do I entrust the education and maintenance of my children during that time; but in case of her death or marriage before the time appointed for a division as aforesaid, then it is my desire that my children be all supported, and that the girls under sixteen, and the boys under eighteen, be as well educated out of the annual profits of my estate as they will allow up to the time of division, the profits to be first applied to their support, and in case of a deficiency, then to educate all the children embraced in the last clause, the balance to be applied in educating the younger in preference to the older children."

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The second clause provides, that in case of the death of the wife before the youngest child should arrive at the age of sixteen, the property should be kept together until that time, and then divided.

The first clause makes an absolute gift to the wife, but the subsequent clauses make it manifest that the testator intended that the gift should be a qualified one, and that the profits should be appropriated to the support and education of his children. He evidently gave the wife, so long as she might remain unmarried, "the entire use, profits, and control" of his estate in confidence, that she would properly appropriate such profits for the maintenance and education of his children. And that object was so prominent in the mind of the testator that he provided for its accomplishment in the event of the wife's death. The absolute gift to her is complete with a specific purpose. Although the language of a will may make an absolute gift, yet if other appropriate expressions be used which show, with sufficient certainty, that but a qualified gift was intended, a court of equity will look to the clear intention of the testator, and raise a constructive trust when none has been expressly declared. But the words of recommendation, or of hope used by the testator must be certain; first, as regards the objects to whom such terms are applied, and second, the subjects of property given must also be certain. The words are then considered imperative and create a trust. This, says Judge Story, is the result of the cases on that subject. Story's Eq, Jurisp. 452, § 1068, 4th ed.

In the case of *Knight* v. *Knight*, 3 Beav. R. cited in Story's Eq. Jur. 456, the rule is thus laid down: That when property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust. First, if the words are so used, that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of

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the recommendation, or wish, be also certain. The examples given in illustration of the rule, are very much like the present case, and certainly reach it in principle.

In *Wright* v. *Atkins*, 1 Turn. & Russ. 157, Lord Eldon said, that in order to determine whether a trust of this sort is a trust, the words must be imperative, the subject must be certain, and the object must be as certain as the subject.

We think the 4th clause of the will comes within the rule. Taken altogether, it is clear that the children were the objects of the testator's bounty. An unconditional gift of the profits of all the property to the wife, would of course defeat the subsequent appropriation to the maintenance and education of the children. The subsequent declaration, therefore, that they were to be supported and educated out of the profits, is a condition annexed to the previous words of gift. And the appropriation of the profits to that purpose in case of the death of the wife, shows that he had confidence that she would so apply them during her life. The first clause of the will contains an absolute gift, but that was not intended. It is entirely inconsistent with the subsequent provisions for a division of the property, and the appropriation of the profits. The whole structure of the will shows that the disposition in favor of the wife, was made in confidence that it would result to the children. To prove this, let us suppose that the testator had nothing of the kind in view; then, by the first clause he gave his wife the entire estate during her widowhood. This would have carried the profits. Then in the fourth clause, he gave her the profits. The children, then, were left without the means of support or education. Such a result is entirely inconsistent with the declared purpose of the testator, contained in the conclusion of the fourth clause, where he expressly declares that the profits shall be applied to the support and education of the children. The language employed seems to leave no room for doubt. "During my wife's widowhood she is to have the entire use, profits, and control of my estate, and to her discretion do I entrust the education and maintenance of my children during that time." Now if he had said, "I give the profits of my estate to my wife,

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and therefore entrust the education and maintenance of my children to her," no one would have doubted that he looked to the profits as a fund so to be applied. And the language used in effect amounts to this. It amounts to an imperative command that his wife should support and educate the children. The manner of educating and supporting was left to her discretion, but nothing more. We have, then, language which imperatively commands that the children should be educated and supported, and a specific fund set apart for that purpose. The words are imperative, the subject certain, and the objects equally certain. Hence we conclude, that the will created a constructive trust in the profits of the estate for the support and education of the children, and that the wife, as trustee, is bound to carry out the trust. The property cannot be sold for her debts, for that would cut off the profits and defeat the trust.

The court charged the jury, that by the will such an estate vested in Mrs. Longstreet as was liable to execution against her, and that she was entitled to, and not bound to account for the profits. In this there was error, as it was in proof that there were children living.

But it is objected that the administrator is not a proper party; that Mrs. Longstreet should have been the claimant. The answer to this is obvious; this trust was to be executed by the executors in case of her death, who are now represented by the administrator. If the widow will not protect the property, then it is the duty of the administrator to do so. It is still part of the estate of Longstreet, and subject to a charge in favor of his heirs. The administrator is the representative of the estate, and he really had possession of part of the property. He is a joint trustee with the wife, and may interpose his claim to prevent the trust from being defeated.

Whether the party, who is seeking to subject this property, will be entitled to a remedy when the trust is fully executed, we need not now determine.

Judgment reversed and cause remanded.

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RICHARD M. ELLIS *vs.* CHARLES S. ABERCROMBIE, use of Thomas S. Stephens et al.

It is error to dismiss a trial of the right of property levied on under execution, where the bond has been regularly given, because no affidavit by the claimant of the property of the nature of his claim appears in the case; the statute requires an affidavit to be made, and does not allow the sheriff to take a bond for the trial of the right unless such an affidavit has been made; but while the statute requires the sheriff to return the *bond* with the execution into the court, it does not require him to return the affidavit, (H. & H. 634, § 20); his omission to do so cannot prejudice the claimant.

IN error from the circuit court of Washington county; Hon. George Coalter, judge.

On the 19th of November, 1844, Charles S. Abercrombie, for the use of Thomas S. Stephens and John L. Mapman, sued out an execution against William S. Ellis, which was levied on certain slaves and cord wood. Richard M. Ellis executed to the sheriff a claimant's bond, which recited among other things, "and whereas said Richard M. Ellis has made claim to said property by affidavit, in order to the trial of the right thereto, in said circuit court." The sheriff returned on the execution the fact of the levy, and continued, "whereupon Richard M. Ellis, by his attorney, in fact, Ezra R. Price, claimed the said property to be his own, and having executed to the plaintiff a bond conditioned according to the statute in such case made and provided, with Francis Griffin and William S. Hood as his sureties, upon the 17th day of December, 1844, and the said property was on that day delivered to the said claimant, and the said bond returned with this writ into court."

At the April term, 1845, Richard M. Ellis tendered an issue to the country for the trial of his right. At the same time, subsequently, the plaintiff in execution moved to dismiss the case, because there was no affidavit filed by the claimant of his claim

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to the property levied on. The motion was sustained, the case dismissed, and this writ of error prosecuted by Ellis.

Sanders and *Price*, for plaintiff in error, contended,

1. That the statute did not require the *affidavit*, but only the *bond* to be returned with the execution. (H. & H. 634, 635.)

2. That the *oath* required by the statute was for the benefit of *the sheriff*, and could not in any way affect the rights of the parties to the suit.

Counsel for plaintiffs argued at length other points arising on the record, which are not inserted because not passed upon by the court.

D. Mayes, on the same side, contended, in addition, that the statute did not even require a written affidavit, and that an *oral* one would be a sufficient compliance.

Guion, for defendants in error.

1. The proceeding by which this case was brought before the court below, was a *statutory one*, and the requisitions of the statute must be complied with; it enables a person not a party to a judgment to prevent its execution, and obtain possession of the property levied on, and it would be of mischievous tendency to dispense with a single requirement of the statute.

2. The affidavit is the foundation of the proceeding, and the court is bound to see that the claim is conducted according to law, and has a right to dismiss it, if it be not.

3. The proceeding is analogous to the writ of attachment and the action of replevin. It will not be pretended, if the affidavit be wanting in either of those cases, the court may not dismiss them; and for the same reason, it properly dismissed this case. They are all remedial statutes, granting peculiar statutory remedies, and in each case, to avail himself of the remedy, the party must comply with the statute.

George S. Yerger, *Downs* and *Baine*, on the same side

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Mr. Justice THACHER delivered the opinion of the court.

This is a trial of the right of property. Upon the trial, the plaintiff in execution moved the circuit court to dismiss the cause, because there was no affidavit of a claim to the property filed by the claimant. This motion was sustained. A claimant's bond appears in the record, which sets forth that the claimant made claim by affidavit to the property levied on.

A sheriff may not properly take a bond in such a case, unless an affidavit, as required by statute, be first made; but, in cases where the sheriff is not a party, it will be presumed he performed his duty in this particular.

The statute, (H. & H. 634, § 20,) requires the sheriff, or other officer, to return the bond with the execution to the clerk's office, from which such execution issued, and the court is thereupon directed to cause an issue to be made up between the parties to try the right of property before a jury. The statute is silent as to the disposition of the affidavit. It does not require that it should be made in the circuit court, or elsewhere particularly. It but requires an affidavit to authorize the sheriff to take a bond, by virtue of which he may suspend the sale under the execution.

The judgment must be reversed, and the cause reinstated in the circuit court for further proceedings.

WILLIS B. OTTS *vs.* BENJAMIN A. ALDERSON.

In the purchase of personal property, the general rule is that the purchaser buys at his own peril; *caveat emptor;* unless the seller either give an express warranty; or the law imply one from the circumstances of the case, or nature of the thing sold; or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale.

No particular form of words is necessary to the creation of a warranty; any affirmation or representation in relation to the article sold is sufficient, if it be intended to have that effect.

The law implies a warranty, 1. That the seller has title; 2. That the arti-

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cles are merchantable where, from their nature or situation at the time of the sale, an examination is impracticable. 3. Upon an executory contract to manufacture an article or to furnish it for a particular use or purpose, that it is reasonably fit and proper for such purpose and use as far as an article of such kind can be. 4. Against all latent defects, 1st, when the seller knew the buyer relied on the judgment of the seller who knew or might have known the existence of the defects; 2, where a manufacturer or producer undertakes to furnish his articles in answer to an order; 5. That goods sold by sample correspond with the sample in quality.

O. bought of A. a slave, and agreed to give for him a full price for a sound slave; there was no proof of warranty; the slave at the time had scrofula, and was constitutionally diseased with it; there was no proof that A. knew of the disease, or represented the boy sound. A. sued O. for the purchase-money: *Held*, that he was entitled to recover the full amount, though the slave was worthless.

In error from the circuit court of Adams county; Hon. Stanhope Posey, judge.

Benjamin A. Alderson sued William B. Otts in assumpsit on an open account for three hundred dollars, the price of a slave, due on the first of January, 1845. The jury found a verdict for Alderson; Otts moved for a new trial, which being refused, he embodied the evidence in a bill of exceptions.

Abel Alderson testified that since the institution of the suit, he had heard Otts, who was a physician, say that he had bought the slave Enoch of Alderson for $300; at the same time Dr. Otts told him the boy had been sick and caused him a great deal of trouble and he would give him back to the plaintiff if he would pay him for the money expended in attending him whilst sick; that Otts, understanding that one William Dunbar would take the boy at that price, agreed to deliver him up to him; he did not know whether it had ever been done.

F. L. Claiborne for defendant testified that he knew Enoch in a month after Otts bought him; the boy when he first saw him was sick, and continued so for eighteen months, during which he was of no value, but rather an expense; that the boy had become a great deal better, the last time he saw him, about six months ago, he supposed he was well; Dr. Otts nursed the boy with great care, took him in his own room, and had

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become attached to him; the boy was twelve years of age, and if sound, three hundred dollars would be a good price for him; he had heard the plaintiff offer to take the boy back and refund what had been given for him; the defendant refused this unless he would also pay the expenses he had been at by reason of his illness. He had heard defendant say he would not take a thousand dollars for the boy, because he was attached to him, and he was afraid, if he went into the hands of other's he would not live.

Dr. Monette, a physician, testified that the boy was constitutionally diseased with scrofula, and must have been so from his infancy; he gave the symptoms and marks of the disease, and the condition of the boy during the illness spoken of by Claiborne; he did not think the boy of any value; would not give anything for him; that one of the eyes of the boy was still diseased; scrofula was curable in boys before the age of puberty, but it was likely to break out in them in after life at any time on exposure or hard treatment.

Dr. Juge, who had attended upon the boy, proved similar facts with Dr. Monette and Claiborne, and stated that the boy was well except his eye.

E. D. Farrar proved that the boy had belonged to his father, from whose estate he had been purchased by Alderson; and that he had always regarded him as a stout, healthy boy; Alderson lived in Louisiana.

There was other testimony as to the soundness of the boy, which did not vary the proof; and also evidence of some payments by the defendant; the plaintiff introduced a letter from the defendant written in June, 1844, in which the defendant says, "Enoch's belly is not quite as large as when he came from the swamp; he has passed some very large worms, and I do not think he is clear of them yet. If he only had size, I had rather have him than any body's boy; he has improved a great deal."

The plaintiff asked the court to instruct the jury: 1. Unless they believe, from the evidence, that the plaintiff warranted the negro sold to the defendant to be sound at the time of the sale,

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it is no defence to the recovery of the purchase-money that the negro was unsound.

2. That the jury cannot presume any fact in the absence of all proof in relation to the subject-matter of such presumption.

3. That the jury cannot presume, in the absence of all testimony, and that it must be proved to their satisfaction by evidence before they can find the same.

These instructions were given.

The defendant asked for these instructions: 1. "If the jury find, from the evidence in the cause, that the defendant agreed to give for the boy a price which would be a full one, had the boy been sound, they have a right to infer, in the absence of proof of any special contract of sale, that the plaintiff represented the boy sold as sound."

2. "The court instruct the jury, if they find, from the evidence in the cause, that the boy Enoch was unsound and of no value, they must find for the defendant."

They were refused, and the defendant excepted.

The defendant then moved the court to instruct the jury, that, if they find from all the evidence in the cause, that the boy Enoch, at the time of the sale, was unsound and of no value, and that the plaintiff had knowledge of his unsoundness, and did not communicate it to the defendant, that such suppression of his knowledge was a fraud, and the law is for the defendant. The court gave the instruction with the qualification, "that he would give them as an abstract proposition of law, but that they had no application to the case."

The defendant again excepted, and prosecutes this writ of error.

Sanders and *Haggin*, for plaintiff in error,

Insisted, 1. That under the proof, the full price given for the slave, &c., and under the rules laid down by Story on Sales, 312, 313, there was a breach of the implied warranty in this; 1. The slave was not merchantable, for he was not even of any value, and was not therefore reasonably fit for the use that slaves are purchased for. 2. He was affected with a latent defect, the scrofula.

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2. The jury had the right to infer, under the proof, especially from the letter of defendant, that the slave was diseased at the time of sale, and his former master knew it; and the court erred therefore in its qualification of the instruction asked by the defendant. *Timrod* v. *Shoolbridge*, 1 Bay's R. 324.

Reed, on the same side.

A warranty will be implied in this case;

1. Because this boy sold for a sound price; or in other words, for the full value of a sound negro. 1 Nott & McCord, 143; 2 Ibid. 76; 1 Bay, 324; 2 Ibid. 380; Hayw. (N. C.) 464.

2. Because the vendee could not, by inspection, discover the defect in this boy, as the proof shows that the disease under which he was laboring, will remain in the system for a considerable period before it is developed. Story on Sales, 303, 307, 313, 314, 317, and the authorities there cited.

3. The court below erred in giving the instruction asked for by the appellee, because the evidence shows that there was no bill of sale or particular contract; in the absence then of a distinct contract, the law under the evidence will imply a warranty of those defects, at least, that could not, by inspection, be discovered.

Mr. Justice CLAYTON delivered the opinion of the court.

The only question in this case is, whether a full price paid in the purchase of a slave implies a warranty of soundness.

On this subject, the general rule is, that the purchaser buys at his own peril, *caveat emptor*, unless the seller either give an express warranty, or unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold; or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale." Story on Sales, 293.

No particular form of words is necessary to the creation of a warranty — any affirmation or representation in relation to the article sold, is sufficient if it be intended to have that effect. *Kinley* v. *Fitzpatrick*, 4 How. 59. There is certainly a ten-

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dency in the modern cases to enlarge the responsibility of the seller, and to extend the doctrine of implied warranty. The growing spirit of commerce seems more and more to require, that every vendor of an article should be held answerable for its merchantable quality. Still the general rule is as before stated, and every deviation from it, must be regarded as merely an exception. The exceptions have, by a late writer, been ranged under five distinct classes. 1st. A warranty is implied that a seller has title. 2d. That the articles are merchantable, when from their nature or situation at the time of the sale, an examination is impracticable. This rule is most frequently brought into requisition, where the seller is the manufacturer. 3d. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as an article of such kind can be. 4th. A warranty is implied against all latent defects in two cases; 1, where the seller knew the buyer did not rely on his own judgment, but on that of the seller, who knew or might have known the existence of the defects; and 2, where a manufacturer or producer undertakes to furnish articles of his manufacture or produce, in answer to an order. 5th. That goods sold by sample correspond with the sample, in quality.

Another exception to the rule, that a purchaser ordinarily buys at his own risk, is where the vendor has been guilty of fraudulent misrepresentation or concealment. Story on Sales, 293–330. See also *Leflore* v. *Justice*, 1 S. & M. 381.

The evidence in this case does not bring the purchaser within the purview of any of the exceptions. He must charge his loss to a presumptuous rèliance on his own judgment, and his improvidence in failing to obtain a warranty against defects, to which the property was in its nature liable. The charges of the court propounded the law correctly.

The judgment is affirmed.

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WILLIAM H. BROWNING ET AL., Executors of Daniel Harvie, *vs.* ALBERT Y. WATKINS ET AL.

A bill of interpleader cannot be maintained by any person who does not admit a right in two claimants, and also show two claimants in existence capable of interpleading; in every case of interpleader, the case tendered ought to be of such a character that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and the plaintiff be under liability to neither beyond that which arises to the title of the thing in contest.

Where there is no general personal representative, a special administration limited to the subject of the suit is generally required in equity.

H. brought suit against F. on a note; F. being doubtful of the ownership of the note, whether it belonged to H., or W., deceased, filed his bill of interpleader against H. and the heirs of W. (there being no administration on W.'s estate,) and brought the money into court. H. and the heirs of W. answered, the former insisting also on a demurrer; the vice-chancellor, on the proof, awarded the money to W.'s heirs: *Held*, that it was not a case for a bill of interpleader; the heirs were not in a condition to assert a claim against H., and therefore there were not *two claimants* of the thing in controversy; administration ought to have been taken out on W.'s estate, and his administrator conducted the litigation in that behalf.

ON appeal from the decree of the district chancery court at Columbus; Hon. Henry Dickinson, vice-chancellor.

The trustees of the Franklin Female Academy state in their bill, that Daniel Harvie, in his lifetime, sued them upon their writing obligatory for $740, payable to M. M. Jordan, to the April term, 1845, of the Lowndes circuit court; that Harvie died; and his executors, William W. Browning and Robert Howard, had revived the suit. That Albert G. Watkins and others, the heirs at law of John D. Watkins, deceased, claim title to the bond, and threatened to sue upon it. Watkins died in Texas, and Louis B. Taliaferro administered in that state; but no administration had been taken out in this. They ex-

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pressed their willingness to pay, if they knew whom to pay to, and offered to bring the money into court, and prayed that the executors of Harvie and the heirs of Watkins might interplead.

The heirs of Watkins and the executors of Harvie answered the bill of interpleader. The former asserting an absolute right to the note, the latter not asserting positively a right in Harvie, insist on the benefit of a demurrer to the bill of interpleader, in their answer.

It is not necessary, in view of the decision of this court, to notice further the pleadings and proof in the court below, except to state that it was in proof that the bill single in controversy had been inventoried in Texas as portion of the estate of Watkins. The complainants brought the money into court, and the court decreed it to Watkins's heirs.

The executors of Harvie appealed.

William P. and *John F. Jack*, for appellants.

1. Property remaining undisposed of at the death of a person cannot be claimed by the heirs except through the medium of an administrator; and in such sase it is the duty of the court to appoint one, as it is indispensably necessary, to give title to the distributees. North on Probates, 112, n. 4.

2. If this claim belonged to the administrator in Texas, being there inventoried, the rights of the distributees of Watkins, whatever they may be, must be enforced and settled in the proper tribunal in Texas.

3. At common law the administrator could sell, transfer, or give away the assets of his administration at pleasure, being responsible therefor to the heirs, (North on Probates, 86, n. 1); and we know of nothing in the laws of Taxas interdicting this right; it would be strange if in Texas the distributees would not have to claim through the administrator.

4. In this state an administrator may lawfully sell, transfer, and negotiate the bills receivable, for the benefit of the estate, or in payment of claims against it; and it is not shown that this note was not so transferred in Texas.

5. The heirs of Watkins, we think, cannot recover the money

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in this proceeding; there is no title in them; if the administrator in Texas has wrongfully parted with the claim belonging to the estate, he must account for it there; the heirs of Watkins must seek their redress there. At all events, they cannot *here* maintain a suit for what appertains to the *personal* administration.

Boykin and *Crusoe*, for defendants in error.

1. The proof shows that the bond was the property of Watkins's estate in Texas, and inventoried there as such; and if the court had jurisdiction of the case as to Watkins's heirs, the decree of the chancellor was right.

2. There was no administrator in this state; they alone represented the intestate; the money is coming to them, even if it passes through the hands of an administrator, and they ought not to be sent away to Texas, to enforce their rights there against the administrator and his sureties, when the decree rendered here has done justice to all the parties. *Farve's Heirs* v. *Graves and Wife*, 4 S. & M. 707.

3. If Watkins's estate is in debt, that is matter of defence for the defendant to show in avoidance of the decree.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Suit was instituted by Harvie, on whose estate the plaintiffs are executors, against the Trustees of Franklin Academy, on a writing obligatory. The trustees being doubtful as to the ownership of the instrument, filed a bill of interpleader against Harvie's executors, and the heirs of J. D. Watkins, and paid the money into court. Watkins died in Texas, and there was no administration here on his estate. It is alleged in the bill that Harvie had received the writing obligatory from Watkins's administrator, in Texas, for collection only; notwithstanding which he had brought suit in the name of the payee for his own use.

The parties answered, Harvie's executors insisting on the benefit of a demurrer. They do not positively assert a right in Harvie, whilst a right in Watkins's estate is positively asserted

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by his heirs; and on the proof, the vice-chancellor decreed in favor of the heirs.

The decree is probably sufficiently sustained by the proof, so far as the title to the note is involved; but the important question arises, Can the parties brought in by the bill litigate this matter? Watkins was the owner; but are the heirs clothed with such right as to enable them to maintain a suit in chancery under the circumstances? The case of *Farve's Heirs* v. *Graves and Wife*, (4 S. & M.) is relied on; but it is distinguishable from the present case in many particulars. Farve had died in New Orleans in 1813. His widow, under an irregular or pretended administration, had taken possession of all his property in this state, which consisted of a large estate, much of which had been wasted. She had, with her husband Graves, continued to hold the property for many years, and to receive the profits. She was of course entitled to part of it; besides which, the will contained a provision in her favor. She, it would seem, claimed the whole, or at least had refused to account to the heirs. She had sold part of the property, and converted the proceeds to her own use. Her adverse claim, the unsettled condition of the estate, her undivided interest, and the necessarily complicated state of accounts, which had been running on for upwards of twenty years, required the powers of a court of chancery to enable the heirs to obtain justice. But in this case the heirs assert a right to have a decree in their favor for the amount of a single debt due their ancestor. They can claim only as distributees, and not as the legal representative of Watkins. Where there is no general personal representative, a special administration, limited to the subject of the suit, is generally required. Mitf. Plead. 177, 178.

A bill of interpleader must show that both defendants claim a right, or one or both may demur. Mitf. Plead. 198. One, it is true, may be a legal, and the other an equitable right. An equitable right is such right as may be asserted and maintained in a court of equity. Ordinarily the heirs of a deceased person cannot in equity recover the debts due the deceased. That rule would entirely dispense with administration. In affording

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relief on a bill of interpleader, where the rights are legal, equity acknowledges and acts upon the foundation of the legal right, and gives to the parties that measure of justice which they ought severally to attain, if, by circuity of action, they were to proceed at law. Jeremy's Eq. 346. The heirs could not proceed at law or in equity. A party cannot litigate by interpleading where the court can make no decree against him, or where the decree would not finally settle the right. A decree against these heirs would not bind an administrator. The case tendered by a bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiff is not under liability to either beyond that which arises to the title of the thing in contest. 2 Story's Eq. 160, n. 2. A bill of interpleader, says Judge Story, cannot be maintained by any person who does not admit a right in two claimants, and does not also show two claimants in existence capable of interpleading. 2 Story's Eq. 164. The true ground on which the plaintiff comes into equity is, that he may not be vexed by two suits against him, pending at the same time. Id. 148. This case does not present two persons capable of interpleading, nor could they maintain two suits at the same time. As a proper case is not made out for a bill of interpleader, Harvie's executors must have the benefit of a demurrer. We cannot decree against them without decreeing in favor of the other party, which cannot be done. If administration should be taken out, the administrator may still have a remedy, as the title seems to be in Watkins's estate.

Decree reversed, and bill dismissed.

THOMAS HARDEMAN ET AL. *vs.* JAMES COWAN.

It is a well established general rule, that where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor; if he extinguish an incumbrance, or buy in an outstanding title, all he can ask or require is, the repayment of the money he has so laid out.

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And this rule applies, whether the purchase of the incumbrance be by the vendee or his wife; there is such an identity between them, that what under such circumstances cannot be done by the husband, cannot be done by the wife; to permit the wife to purchase when the husband is forbidden, would be a mere evasion of the rule.

H. bought of C. a tract of land in this state for $3,600, in November, 1841; there were then judgments against C. for about $1,000; and it was part of the contract of sale that H. should pay by the first of January, 1842, $600 towards these judgments, and the remainder of the purchase-money in three equal annual instalments, from March 1, 1842, when C. was to make H. a deed; H. was put, at the time of sale, in possession of the land; and C. left this state for Tennessee, where he lived; early in December, 1841, the land was sold under two of the judgments against C. at different times, and bought by L. H. for $375; L. H. was the brother of H.'s wife, and bought for her benefit and for her, advancing his own money for the purchase, but buying exclusively for his sister; H. paid the $600 at the stipulated time, and C. made him a deed which H. refused to receive on the ground that C. could not make him a title, by reason of the previous sale to L. H. *Held*, that the purchase by L. H. was in reality a purchase by the wife of H.; that H.'s wife could not set up her title thus acquired against the vendor of her husband; and that the land was subject to the payment of the residue of the purchase-money due C. after the repayment to L. H. of the money advanced by him.

A note for a sum certain, payable at a day certain, in cotton, at a fixed price, becomes absolute for the payment of money upon the failure to deliver the cotton at the day; such a note is different from one payable in bank notes.

APPEAL from the district chancery court held at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Thomas Hardeman, on the third of December, 1842, filed his bill, in which he states, on the ninth of November, 1841, a written agreement was made between himself and James Cowan for the sale by the latter to him of a tract of land in Yalabusha county; the purchase-money was $3,600; of which, by the terms of sale, Hardeman was to pay $600 on certain judgments then in force in the circuit court of Yalabusha county against Cowan, by the first of January, 1842; the residue to be paid in three equal annual instalments, the first falling due on the first of March, A. D. 1843; — Cowan, on his part, to convey the land by his general warrantee deed, on the first of March, A. D. 1842; Hardeman was to execute his three notes for the purchase

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money, which were to be payable in cotton at ten cents per pound, and to be secured by personal security or mortgage at the option of Hardeman. The complainant charges that he fully and literally complied with this contract on his part, and on the twenty-seventh of December, 1841, paid $600 on a judgement of Armour, Lake & Morton against Cowan, recovered in the circuit court of Yalabusha county; that on the eighteenth of February, 1840, George A. Thompson sued out a writ of attachment against James Cowan, which writ was levied on the twentieth of February, 1840, by the sheriff of Yalabusha county, on the same land, which was afterwards sold to complainant; on the eighteenth of May, 1840, judgment was rendered against Cowan for the sum of $143; and on the eighth of July, 1840, execution issued on this judgment, and was stayed by order of plaintiff's attorney; on the next execution the valuation law was claimed, and the sale postponed in consequence until November 23, 1841, when the plaintiff, by his attorney, sued out a writ of *vendi. expo.*, under which the land was sold to J. Lock Hardeman on the third of January, 1842, for $213.50; that in the same court, W. Whitaker obtained judgment against Cowan on the nineteenth day of May, 1840, for $123; a *fi. fa.* issued, and was levied on the land in controversy on the ninth of October, 1840, the benefit of the valuation law claimed, and in consequence no sale; on the fourth of December, 1841, the plaintiff by attorney sued out a *vendi. expo.*, and the land was sold to J. Lock Hardeman on the seventh of February, 1842, for $182. The sheriff conveyed this land by deed to J. Lock Hardeman, the purchaser; the deeds were exhibited with the bill.

The bill then charges, that the vendee has on his part fully and entirely complied with all the conditions and terms of the sale according to the intent and effect of the contract, but that Cowan has wholly failed to perform or offer to perform on his part; and is not able now to comply with the contract, J. Lock Hardeman having purchased all of the land under judgments and executions against Cowan, which were liens on the land long before the sale to complainant; and the legal title is now

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in the purchaser; and that Cowan is insolvent, and a non-resident.

The complainant filed an amended and supplemental bill, in which he states that he knew of the existence of these judgments; and that Cowan represented that he was able and would pay all of them, except the sum of six hundred dollars to be paid by Hardeman; and agreed to release the land from the incumbrance.

Complainant also told Cowan that if he left without removing these liens, his creditors would sell the property; that in half an hour after the contract was signed, Hardeman left for the lower part of this state; and when he returned he was informed by George A. Thompson, one of the creditors of Cowan, that the land would be sold on the third of January, 1842, which was the first information he had that *fi. fas.* had issued. He charges that the pretence that J. Lock Hardeman purchased with *his* funds, directly or indirectly obtained from him, is false, but that J. Lock bought with his own funds; he denies the pretence and charge of combination; charges that no deed was offered or tendered to him by Cowan, and that it is false that the land was sold at his suggestion, or by his contrivance; but states, the land was sold against his desire, and that it is false that J. Lock Hardeman has conveyed these lands to him or to his wife, or that he is bound to do so.

Cowan's answer states, that it is true he represented to complainant that he was able to pay off the incumbrances; that he tendered a deed in strict compliance with the contract, and when he sent down the deed he was prepared to have discharged these liens, but to his surprise learned that the land had been sold; he charges that the sale was brought about by the contrivance of complainant, to cheat and defraud him; states that J. Lock Hardeman refused to make any arrangement with him, but referred him to complainant; he files letters of J. Lock Hardeman, as exhibits to his answer, which are as follows, viz.:

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"To Mr. Thomas Hardeman, Oakuchukuma, Yalabusha Co., Mississippi:

"Arrow Root, 29th May, 1843.

"Dear Thomas:—Mr. James Cowan, the former owner of the lands upon which you live, has called upon me while here to attend to some other business, and has requested me to write to you relative to the above lands. I have related to him all the circumstances under which I became the purchaser, and the purpose for which I hold it, to wit, the benefit of my sister, your wife; and that I have made a power of attorney to dispose of the same, and transfer the title to any whom you may designate. Mr. Cowan thinks that as the lands are held for the benefit of your family, and that he has not, in the sale at which I became the purchaser, a full compensation, you should make him some further compensation; declaring that he is perfectly willing to have all your matters and difficulties settled upon a fair and liberal basis. This, it would seem to me, is what every man of honor ought only to desire; I therefore call your attention to a review of all the circumstances of the case, and request you to do for me, as my agent, that which may seem consistent with sound principle and liberality, and not inconsistent with the proper interest of my sister, your wife. Mr. Cowan's deportment while here has been gentlemanly, and his propositions all fair and open, and ought to be met on our part in like fairness. This is surely the best way to settle all difficulties among all men. Very truly yours,

J. Lock Hardeman."

"To James Cowan, Esq., Mt. Holy Oke, Tennessee:

Arrow Root, 12th August, 1843.

"James Cowan, Esq. Dear Sir:—I am in receipt of your letter dated 5th July, and take the first opportunity to reply to it. I pass at once to the main subject of your communication, and notice that you call upon me to deny, reiterate or explain the subject and tenor of an open letter which I forwarded to Thomas Hardeman by your hands. In the first place, permit me to say that as the letter in question was an open one, you had a right to its contents either by copy or original, which, if

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you have not kept, I have no doubt can be procured, and my signature to the same would sufficiently bind me. . . . . In my first letter to you on the subject, I truly set forth the whole grounds of the case. . . . . In my open letter I requested my friend, the husband of my sister, to review the whole transaction between you and himself, and to do what his conscience would dictate to be just between man and man. All this seemed to accord with your wishes. In my private letter, mailed a few days afterwards, the same tenor and substance were repeated, and closed with my leaving the whole matter at issue in the hands where I found it. There is but one thing more that could be done by me while I profess to square my conduct by right; and that is, to pay out of my private purse, and without recourse upon any person or thing, whatever loss or damage you have or may sustain by my interference in this matter, that you might or would not have sustained had I not interfered. Thus far I hold myself morally bound, when my mind is satisfied that I have been the means of heaping burthens upon others. But if I have only been the instrument in the hands of others, to do what was pre-resolved upon, and others' means ready, why, I have just as much moral guilt as the bridge upon neutral ground, that carries over with equal safety the armies of friends and foes. I now indulge the hope that my position and meaning are sufficiently understood, to make this close our correspondence upon a subject in which I have never considered myself as principal. . . . . .

Very respectfully,

J. Lock Hardeman."

The answer of Cowan further insists that Hardeman was in possession under his contract of sale; that he was still in possession, and had not been evicted; that he was not entitled to a rescission; all he could claim was repayment of what had been paid to take up the incumbrances; and that the purchase of J. Lock Hardeman was for the benefit of the complainant, or his wife.

Cowan also filed a cross-bill against Thomas Hardeman and

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wife and J. Lock Hardeman, for a specific performance of the contract of sale; in this bill he states the contract — the judgment against him, and that several hundred dollars were due after the payment of the six hundred by Thomas Hardeman; states that he made a deed, which he tenders with his bill, and prays that Hardeman may be required to give his notes according to his contract; he states that he sent the deed to Hardeman before the 1st of March, 1842, with funds to discharge the judgments, but to his surprise found the land had been sold; that Hardeman refused to accept the deed, alleging the land had been sold. He alleges that the sale was out of the ordinary course of sheriffs' sales; that sheriffs usually delayed until the return term of the writ, which would have been in May, after said sale; he charges that the sale was brought about by Hardeman, for the purpose of defrauding him and preventing him from performing his contract; that the sale would not have occurred until March, 1842, if Thomas Hardeman had not brought it about; that the land was bought at the sale for the use and benefit of Thomas Hardeman, and with his means; the land was purchased by J. Lock Hardeman, who is the brother of Thomas Hardeman's wife, and that he gave Thomas Hardeman a power of attorney to sell it to whom he pleased, and that the land was conveyed to Jerusha, wife of Thomas Hardeman, under this power of attorney. And the cross-bill interrogates the parties as to these facts.

Thomas Hardeman and his wife, in their answer to the cross-bill, admit that there were several hundred dollars in judgments against Cowan, more than he, Hardeman, was to pay; but denies that Cowan sent any person with means to pay these judgments; they admit, that one M. Hays came to Hardeman's house, and said he had a deed, but he presumed it was unnecessary to tender it; that Hays said Cowan had no means to pay the judgments. In answer to the charge of surprise at the sale of the land, they say Cowan could have expected nothing else; that the land had been levied on twelve months before, and he told Cowan the creditors were complaining in consequence of the delay, and if he left without paying, the land would be sold as soon as the law would permit.

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They deny the charge of combination and fraud; deny that the sale was brought about, induced, or expedited by Thomas Hardeman, either directly or indirectly; deny that the land was purchased for Thomas Hardeman's use and bought in with his means; deny that they have refunded the money bid, or that they ever will do so. Admit J. Lock Hardeman bought the land, but deny that he gave Thomas Hardeman a power of attorney, as charged; and state that John Hairston, of Yalabusha county, is the agent and attorney of J. Lock Hardeman.

J. Lock Hardeman, in his answer, states, that in the latter part of the year 1841, he had unfinished business in Mississippi, where he once resided, and about the 31st of December, 1842, visited his relations in Yalabusha county; that on the evening of his arrival at Thomas Hardeman's, who had married his only sister, he heard something said about the loan of money which had been made to his sister to enable her to purchase the house they occupied, then about to be sold, and this was the first information he had on the subject; that he had nothing more to do with the matter until the day of sale, when, considering the friendly purpose of the loan of money to his sister, he stepped forward and bought the property himself at the sale. These circumstances were explained to Cowan in conversation; and that Cowan could not mistake the expression of his letter, "that he was but the instrument in the hands of others to do what had been preresolved upon;" that he advanced his means to aid his sister, whose husband's affairs were then much embarrassed. He states that he informed Cowan how his means had been brought into requisition, and he became the purchaser, and thereby an instrument in the hands of his sister; he denies that the money used in the purchase was, in whole or in part, the means of Thomas Hardeman, or that he has ever refunded or offered to refund it, or that any other person has done so. He states he will convey to any one whom his sister may desire through her next friend without undue influence, whenever she may wish to change the relationship existing between them, and hence the reference to the power of attorney in one of his letters; he denies that he ever colluded with any one to cheat

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complainant, nor has he been procured to act the part he has acted at the instance or procurement of any one; but that he freely and voluntarily offered to buy the land, desiring no profit other than the gratification of aiding his sister. He will allow her to sell for her own benefit, but in that case he will require payment of the money paid by him for the land, unless his sister should desire to invest it in a more desirable home, the title to be in his name.

Exceptions being taken to his answer, and sustained, he replied further, that he never did appoint Thomas Hardeman attorney in fact as charged; admits he was the instrument of his sister, who had pre-resolved to do what he did, and that it was the means of John Hairston that were ready for his sister when he advanced his own; that he objected that a third person should do an act of kindness for his sister which should more properly be done by her brother; that he purchased with his own means, having no hope of gain, and has therefore written and spoken of himself as a third person in the transaction.

Exceptions were taken and sustained to the answer of Thomas Hardeman and wife, and in further reply they say, J. Lock Hardeman never gave Thomas Hardeman a power of attorney in reference to this land; that J. Lock Hardeman acted solely for the benefit of Lucretia, his sister; and if the instrument was in the hands of any one, it was of Lucretia alone; that she had pre-resolved to do what her brother did do, and the means of John Hairston were ready to buy the land for her benefit.

E. S. Fisher, Esq., a witness for Hardeman, states that he was attorney in the case of George A. Thompson against James Cowan, in Yalabusha court; that the *venditioni exponas*, issued some time about November or December, 1841, at his instance; that his attention was called to the subject by Thompson, the plaintiff. That Thomas Hardeman never spoke to him on the subject.

John Hairston, also for Hardeman, states, he loaned Mrs. Lucretia Hardeman about four hundred dollars to buy the land; it was at Thomas Hardeman's house; Mrs L. Hardeman and J. Lock Hardeman were present, and the money was handed

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back to him. He was at the sheriff's sale; did not see any effort at the sale to prevent any person from buying, or to aid Mrs. Hardeman, J. Lock Hardeman, or any other person.

Hillary Tolbert, the sheriff, whose deposition was taken by Hardeman, states that the *pluries venditioni exponas*, in the case of George N. Thompson against James Cowan, came into his hands, and he was ordered by Mr. E. S. Fisher to make the money forthwith; that all the writs before referred to came into his hands; that they were issued about the usual time after court; that he was always in the habit of making the money as soon as practicable, especially after the valuation law had been claimed; that he did not hold up executions until the return day. He saw James Cowan in Coffeeville in November, 1841, and had a conversation with him in reference to the judgments and executions against him; and he informed Cowan that he intended to sell so soon as the executions were put in his hands, more especially as the benefit of the valuation law had been taken. He knows of no agency whatever that Thomas Hardeman had in the issuance of these writs; they came into his office in the usual way; Thomas Hardeman was not at home when the writs issued, and did not return home until a few days before the sale. The first conversation he had with Thomas Hardeman, the latter appeared very angry, and said it was strange the land should be sold so soon; that he told him the executions had come to his hands, and that he did not consider it his duty to go to see him about Cowan's business; that Hardeman requested him to postpone the sale, which he would not do, and told Hardeman nothing but a full payment of the executions would prevent a sale on the day advertised. Hardeman again requested him to postpone the sale; he refused to do so, and told Hardeman that he had informed Cowan that he would sell so soon as the executions came to his hands.

An account was taken exhibiting the amount in the original contract due to Cowan.

The vice-chancellor, on this state of pleading and proof, dismissed the original bill, and on the cross bill of Cowan decreed a specific performance and sale of the land, and perpetual in-

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junction against J. Lock Hardeman, from ever setting up his titles as acquired at the sheriff's sale.

The defendants appealed.

Sheppard, for appellant.

1. The contract of sale was *executory;* the vendor was in default and now unable to perform; and there is an outstanding title for all the land under which the holder is making claim; this entitles the vendee, though his vendor has been guilty of no fraud, to a rescission. *Parham* v. *Randolph*, 4 How. (Mi.) Rep. 452; 2 John. Ch. R. 519; *Vance* v. *Heirs of House*, 5 B. Monr. 537. Cowan is insolvent and a non-resident.

2. Incumbrances existed on the land, which the vendor, to induce the purchase, represented that he was able to and would remove and discharge; this he failed to do, and the vendee has a right to rescind.

3. In reply to these positions, it is said, 1. That Thomas Hardeman brought about the sale. 2. That J. Lock Hardeman bought with Mrs. Hardeman's money, and is a trustee for his wife. This is new matter, and must be proved; there is not only no proof of it, but the proof is directly the reverse. There was therefore no foundation for the decree. *Lewis* v. *Woods*, 4 How. (Mi.) R. 86; *Vail* v. *Nelson*, 4 Rand. 478.

4. The notes are payable in cotton at ten cents the pound, and the chancellor's decree is for the full amount due in money.

G. W. H. Marr, on the same side, contended, that the contract should be rescinded, 1. Because Cowan was not able to make title on the day he covenanted to do so; and this inability was occasioned by his own *laches* and in violation of his agreement to pay the residue of the judgments, while Hardeman in all points strictly complied with his part of the agreement. 2 Sto. Eq. 6; 3 S. & M. 683.

2. Hardeman has virtually been *evicted;* a sheriff's sale and transfer of the title to the vendee at that sale is an eviction; Hardeman now holds as tenant of the sheriff's vendee, and not under the contract with Cowan.

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3. There is no proof to sustain the allegations of fraud set up in the cross bill of Cowan; it must fall to the ground for want of proof to sustain it, and thus presents no obstacle to the bill for rescission.

4. It is immaterial upon what ground J. Lock Hardeman advanced the money for his sister, or by what title he holds the lands; it is sufficient that the title is not in Cowan; *he* cannot convey, and cannot therefore obtain a decree for specific performance.

E. S. Fisher, for appellee,

Contended, 1. That a wife could not acquire a title to land which would conflict with a previous right of possession or title by her husband. If she borrowed the money, it was the *husband's* debt, not her's; and thus the purchase enured to him, not her. Chit. on Con. 161, 177.

2. Cowan committed no fraud on Hardeman; he did not conceal the judgments, and Hardeman therefore cannot be relieved against them. Freeman's Chan. Rep. 276, and cases cited. The agreement recited the judgments, and Hardeman cannot set up the *parol* promise of Cowan to pay the residue, as being part of the contract, for 1, parol contracts are merged in written ones; and 2, a contract cannot rest partly in parol and partly in writing. 1 John. Ch. Rep. 273, 429; 3 Rand. 529; 1 Car. Law R. 263; 1 Dall. 426; 4 Ibid. 430; 3 Serg. & Rawle, 609; 8 Wheat. 174. The *risk* of the judgments Hardeman took upon himself. 6 Monr. 230; 2 Pirt. Dig. 500, sec. 179.

3. Cowan only bound himself to make "a good warranty deed;" this related only to the legal form, and not to the goodness of the title. 16 John. R. 267.

4. Hardeman was bound to return possession of the land to Cowan; he cannot retain possession or deliver possession to the sheriff's vendee and resist payment of the purchase-money; he must take his chance of getting possession in an action against Cowan. 1 Litt. 13; 2 Pirt. Dig. 486, sec. 79; Ibid. 490, sec. 128; 3 Mon. 275; 3 J. J. Marsh. 430.

5. Complainant can only claim compensation for the amount

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paid at the sheriff's sale by credit on his contract. Freem. Ch. R. 333, and cases cited.

6. It is incredible that Thomas Hardeman did not suggest to his wife the plan of buying in the property; this plan was arranged *before* J. Lock Hardeman's connection with the matter; it was a concerted scheme, and must have had its origin with Thomas Hardeman; she buys a right *in conflict with a previous right of her husband;* this is conclusive that the husband was the originator of the scheme.

7. The failure of the complainant to deliver the cotton according to contract, converted it into a money contract.

Waul, on same side.

The contract should be rescinded.

1. Because the representations of Cowan operated as a fraud on Hardeman, and were the inducement to the contract; and when a party makes material representations in the sale of land which induce the purchase, he must make them good, and that whether he intentionally deceives or not. Sugden on Vendors, 542; *Miss. U. B.* v. *Wilkinson*, 3 S. & M. 78.

2. Cowan, at the day appointed, was unable to make a title; at the time of the decree he was still unable, and it appearing that he was a non-resident and insolvent, furnishes such facts as will always be sufficient to base a decree of rescission. *Fletcher* v. *Wilson*, 1 S. & M. Ch. 389.

3. The failure to comply on the part of Cowan arose from his own fault. The land was sold against the desire and entreaties of Thomas Hardeman, and with the full knowledge of Cowan.

4. The sale was made openly by the sheriff, and a third party, J. Lock Hardeman, bought the land; there is no proof or testimony to impeach his title under the sheriff's deed, and in the absence of testimony direct or circumstantial, the chancellor has not only decreed that J. Lock Hardeman's title is void, but has decreed that the money he paid from his own funds shall go to the credit of Thomas Hardeman's notes, taking his land and his money from him, and requiring him to act as trustee for the benefit of Cowan.

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Mr. Justice CLAYTON delivered the opinion of the court.

In November, 1841, the complainant, Thomas Hardeman, purchased of James Cowan a tract of land in Yalabusha county, for the sum of $3600, and it was agreed that Cowan should make title by deed, with general warranty, by 1st of March, 1842. At the time of the sale, there were judgments against Cowan in the circuit court of that county, for about $1000; and it was a part of the contract that Hardeman should pay $600 towards satisfaction of these judgments, by the 1st of January, 1842, and should pay the balance in three equal annual instalments, from said 1st of March, for which said Hardeman was to execute his notes payable in cotton, at ten cents per pound, to be delivered at Grenada. Cowan resided in the state of Tennessee, and returned thither soon after making the contract; Hardeman at the time resided on the land. Early in December, 1841, two writs of *venditioni exponas* were issued upon two of the judgments against Cowan, under which the land was twice sold by the sheriff, once on the 3d, and once on the 7th of January, 1842, for the aggregate sum of $375.50, to J. Lock Hardeman, the brother of the wife of Thomas Hardeman, and the land conveyed by the sheriff to him. Thomas Hardeman paid the $600 at the stipulated time. During the month of January, 1842, Cowan, without any knowledge of the sheriff's sale, made a deed, in compliance with his agreement, which he sent to Thomas Hardeman, who refused to receive it, because of the sales previously made by the sheriff. Cowan also states that he sent money at that time to pay off the judgments under which the sales were made; but this is denied, and there is no proof. It is probably not very material.

Thomas Hardeman filed a bill against Cowan, for a rescission of the contract, on the ground of inability on the part of Cowan to convey and make title, according to his agreement. The answer asserts that the sale by the sheriff was brought about by Hardeman, in the absence of Cowan, to defraud him; that Hardeman was in possession, under his contract of sale; that he was still in possession, and had not been evicted. That he was not entitled to a rescission; that all he could claim was repayment

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of what had been paid to take up the incumbrances; and that the purchase of J. Lock Hardeman was for the benefit of the complainant, or of his wife.

Cowan also filed a cross-bill for a specific performance, against Thomas Hardeman and wife, for whose use the purchases were alleged to have been made, and against the purchaser, J. Lock Hardeman. The answer of Thomas Hardeman and wife denies every allegation of fraud, and claims the land for Mrs. Hardeman. In his answer J. Lock Hardeman details his whole connection with the transaction, and sets forth all the circumstances, with becoming candor and fairness. It will be necessary to go into these with some minuteness, as the cause must turn upon those facts, in connection with his letters, made exhibits by Cowan.

In one of his letters he says: "I have only been the instrument in the hands of others, to do what was pre-resolved upon." "I hope my meaning is now sufficiently understood, to make this close our correspondence upon a subject, in which I have never considered myself as principal." In his answer he says, that on the day of sale, "he stepped forward and assumed the place of his sister, and himself became the purchaser. That he became the purchaser, and thereby an instrument in the hands of his sister, to convey to any one whom she may designate." "That he freely and voluntarily offered to buy the land, and advance the means, claiming no profit in the matter, other than the satisfaction of rendering aid to an affectionate sister. Allowing her to sell for her own benefit, but in that case requiring payment of the cash advanced for the purchase of the land." "That he was but an instrument of his sister, in securing her a house, from which her husband was about to be ejected by law; and he has therefore written and spoken of himself, as but a second person in the transaction."

All this goes very clearly to show the situation of J. Lock Hardeman. He did not purchase for himself, and the only interest which in truth he has, is the protection of the purchase-money he advanced. The real purchaser, therefore, was Mrs. Hardeman, the wife of the complainant.

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It is a well established general rule, that where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. If he extinguish an incumbrance, or buy in an outstanding title, all he can ask or require, is the repayment of the money he has so laid out. 1 Sug. on Vendors, 642; Meigs's R. 184; *Meadows* v. *Hopkins*, 4 Monroe, 297, 298; 2 Johns. Ch. 33. See *Ayres* v. *Mitchell*, 3 S. & M. 694.

It is said "the reason of this rule results from the relation which it has been found expedient to establish between vendor and vendee, to preserve the confidence, which in matters of contract, ought to exist between man and man, and prevent undue advantage from information acquired by means of such contract. Having recognized the title by the purchase, the purchaser shall do nothing to the prejudice thereof, so long as the relation continues." Meigs, 185.

This reason is equally operative, whether the purchase of the incumbrance be, by the vendee or his wife. There is such an identity between them, that what under such circumstances cannot be done by the husband, cannot be done by the wife. The privity of estate between the vendor and the vendee, is what prevents the purchase. The wife in some degree partakes of this relation; to permit her to purchase, when the husband is forbidden, would be a mere evasion of the rule. The rule is a general one, and should not be frittered away by refinements and exceptions.

So much of the decree as dimisses the bill of the complainant for a rescission of the contract, is affirmed. We think that on his cross-bill Cowan is entitled to a specific performance. The amount paid by J. Lock Hardeman for the land, must stand as a charge upon it, and must be repaid him with all interest. The notes, although payable in cotton, became absolute for the payment of money, upon the failure to deliver the cotton at the day. *Rankin* v. *Sanders*, 6 How. 58. A note of that description differs from one payable in bank notes.

The decree, in all these particulars, is correct, and the same is affirmed, and the cause remanded, that it may be carried into effect.

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JESSE MEEK ET AL. *vs.* TITUS HOWARD.

Where a judgment at law has been obtained against a person, he cannot obtain relief in equity against the same, on the mere allegation that the grounds of his defence were not known to him at the time of the trial at law, admitting that defence to have been a good one; he must also show that he used at least ordinary diligence to discover them, or that they could not have been procured by such use.

A surety on a bill single, against whom a judgment at law had been rendered by default, filed his bill for relief against the judgment, on the ground that previous to the judgment the holder of the bill had given time to the principal debtor, the bill alleging further, that the complainant was not advised, at the time, of any legal defence at law, that he could plead in bar of the suit; but the pleadings did not aver, nor did the proof show, that he sought information of the principal as to the delay in bringing the suit, or used any diligence or precaution to ascertain whether any defence existed at law; *Held*, that a court of equity could give no relief against the judgment; and that, in fact, the true construction of the language of the bill as to the reason for not making the defence at law, was not that the complainant was ignorant of the *facts*, but of their *legal effect*.

IN error from the district chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

On the 24th day of November, 1842, Titus Howard filed his bill, in which he states, that on the 28th February, 1837, R. M. Spicer, as principal, with B. D. Smith and complainant, as securities, executed to one Thomas Drake a joint sealed note for the sum of $2,300, payable on the 25th of December, 1837, which note was executed in consideration of a negro man sold by Drake to Spicer; that the negro was the property of Meek, and the note immediately passed into his hands by indorsement from Drake, and that Meek became the holder and owner; suit was instituted on the note in the circuit court of Carroll county, and judgment obtained against Spicer, Smith and the complainant, by default, at the October term, 1839, for $2,300 debt, and $329 damages and costs.

The complainant further charges, "that not having been advised, at the time, of any legal defence at law, that he could

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plead in favor of the said suit, he, therefore, suffered judgment to go against him by default, as aforesaid;" that afterwards he delivered collateral security to Meek, for whose use and benefit suits were brought. It consisted of a note on G. W. Hufham and John Wright, for about $1800 or $1900, including interest, which he charges has been paid to Meek, except about $200 or $300, which he charges to be in a judgment in the circuit court of Carroll county, against John Wright; and also some other means which need not be noticed. He charges further, that long before the institution of suit against Spicer, Smith and complainant in the year 1838, complainant requested Meek to bring suit, &c. on this note; that he did not wish to remain security for Spicer any longer, as he considered Spicer a reckless man; that he has been informed, and believes, that after this request made by complainant to proceed to collect the money on this note, Meek agreed to and did give further and larger indulgence to Spicer, in consideration that Spicer would pay to Meek a certain sum of money about the sum of $100 in addition to the sum named in the note, which agreement was made and entered into and carried out without the knowledge or consent of complainant. At the time the request to sue was made, Spicer was in possession of a large amount of property, and if suit had been instituted at the time, the money might have been made out of Spicer's property, without harassing complainant; that Meek made a new contract with Spicer, and did, for a valuable consideration, give Spicer longer time in which to pay the note without the knowledge or consent, and against the expressed wish of complainant. The bill charges fraud and combination, &c.

It is not deemed necessary to notice the allegations of the answer; nor to set out the proof, as this court decided the case on the face of the bill.

The chancellor perpetually enjoined the judgment against Howard and Smith; and Meek prosecuted this writ of error.

Cothran and *Howard*, for plaintiff in error.

1. The defence set up in the bill was a good one at law, and

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was not there made; and the reason given in the bill, for not having made the defence at law, was not sufficient to entitle him to relief in equity. He shows no diligence; no conversation with his principal; the delay in bringing the suit was sufficient to put him on the inquiry; he has not shown that he could not have discovered the facts of his defence by due diligence. *Perry* v. *Martin*, 4 Johns. Ch. R. 566; *Hare* v. *Sprowl*, 2 How. (Mi.) R. 772; *Green* v. *Robinson*, 5 Ib. 80; 4 Bibb, 168; Ib. 348; Ib. 414; 2 Eq. Dig. 324, §§ 4, 9, 10, 12, 16, 17; 3 Johns. Ch. R. 356; 1 S. & M. Ch. R. 474; 2 Sto. Eq. 179, § 895; *Land* v. *Elliott*, 1 S. & M. 611; 1 S. & M. Ch. R. 524.

2. The complainant was guilty of gross negligence; no excuse whatever is shown why the defence at law was not known or sought for. In such case a new trial will not be granted. *Perry* v. *Martin*, 4 Johns. Ch. R. 566; 1 How. (Mi.) R. 113, 114; *Nash* v. *Harrington*, Aiken's R. 39.

3. The money paid for the delay was usurious interest; if suit had been brought for it, usury might have been plead and payment of the note avoided; the consideration, therefore, for the stay was void, and there was, therefore, no valid contract for the stay. *Wilson* v. *Langford*, 5 Humph. 320.

4. If a party does not pursue his remedy with diligence, he will be held to have waived it. After the judgment, the complainant gave the collateral paper to Meek, and thus waived his right, if he had any, to relief. 1 S. & M. Ch. R. 134, 390; 3 S. & M. 693; 1 Johns. Ch. R. 42; Sto. Bill of Ex. § 320, n. 1, p. 363; n. 1, p. 364; 1 S. & M. Ch. R. 126; *Sadler* v. *Robertson*, 2 Stew. Ala. R. 520; 2 Cow. 139.

Sheppard, on same side.

1. The character of Howard, as surety, did not appear on the face of the bond; the defence must, therefore, have been made at law, and could not be made in equity; the party is estopped from making it there. *Willis & Conley* v. *Ires*, 1 S. & M. 319. He should have produced the bond, or alleged that he was surety on its face. *Bank of Steubenville* v. *Carroll's Administrators*, 5 Ham. 207.

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2. The statements in the bill, may be true in fact, and yet Howard have known the facts which constituted his defence at law, and yet not have known the law which made it a defence.

3. He should have looked to his principal for his defence. *Leggett* v. *Morris*, 6 S. & M. 729.

4. From the great lapse of time, more than three years from the judgment to the filing of the bill, he is precluded from making his defence in equity.

Waul, for defendant.

1. The decree was correct, Howard alleges, and it is not denied, that he had no knowledge of the defence at law when sued there. This is sufficient.

2. The note was under seal, and he was estopped from denying his liability at law.

3. The contract for delay is fully established; the decree, therefore, should be affirmed.

Mr. Justice THACHER delivered the opinion of the court.

The complainant, Howard, with one Smith, was a surety of Robert M. Spicer in a bill single, executed to Drake, who assigned it by indorsement to Jesse Meek. He claims to be discharged upon the ground, that after the bill single became due, the assignee, Meek, made an agreement with Spicer, without the knowledge or consent of complainant, for further delay, upon the consideration of about one hundred dollars, for which amount Spicer gave Meek his promissory note.

The bill of complainant shows that on the 28th day of February, 1837, Spicer, as principal, and Smith and Howard, as sureties, executed to Drake a bill single, jointly, which was afterwards indorsed by Drake to Meek. Suit was instituted upon the bill, and a judgment by default recovered thereon. The bill of complainant further sets forth, that the complainant "not having been advised at the time of any legal defence at law that he could plead in bar of said suit, therefore suffered judgment to go against him by default," and, that, after the rendition of the judgment, he gave to Meek certain collateral

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securities in payment of said judgment, a portion whereof the bill charges to have been collected by Meek.

The answer of Meek denies that any agreement for further delay of payment of the bill was made by him with Spicer, but admits that he applied to Spicer for a payment in full, or in part of the bill, after its maturity, and that he induced him to give his separate promissory note for interest accrued upon the bill, being in amount about ninety dollars.

The answer of Spicer admits that an agreement for further delay of payment of the bill single was made between himself and Meek, without the knowledge or consent of Howard, the complainant, and that the consideration of the agreement was his promissory note, for the sum of ninety dollars, which was given "as interest in addition to the legal interest, or to accrue on" the bill single, and that the further time extended from the 13th September, 1838, until the following January, or thereafter.

The language of the bill of complaint makes it clear to every reasonable certainty, that the bill single bore evidence upon its face that Spicer executed it as principal, and Smith and the complainant, as sureties. It affirms that "Spicer, principal, and Smith and complainant, as sureties, executed" the instrument. It also charges that the complainant "was not advised at the time of suit of any legal defence." This language shows that after the judgment at law he did become advised that such defence existed at the time of suit, had the facts upon which it rested been known to him at that time. But in order to have placed himself in a position to claim the relief sought in equity, it was the duty of the complainant to have established beyond doubt all that is necessary to give the court jurisdiction.

Moreover, after a judgment at law, a court of equity should be slow to give relief in a state of case like that presented in this bill of complaint. The defence now set up in equity would have availed effectually at law, had it been then pleaded or relied upon. The mere allegation that the grounds of his defence were not known to a party at the time of the trial at law, admitting them to have been a good defence, is not alone a

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sufficient reason for relief in equity. A party must also show that he used at least ordinary diligence to procure a knowledge of them, or that they could not have been procured by the use of ordinary diligence. *Taylor* v. *Manley*, 6 S. & M., 305; *Nevitt* v. *The Bank of Port Gibson*, 6 S. & M. 513. It is obvious, in this instance, that an application to the principal in the bill single for information of the cause of the delay in instituting the suit at law, even after the suit was instituted, would have put the surety in the way of ascertaining the facts concerning it, and of shaping his defence at law. At least, it would have been a step in establishing the material circumstance of the exercise of diligence and precaution in the premises. Nothing of this kind is shown to have been done or attempted. It may also be observed that a fair construction of the language of the complainant, where, in his bill, he speaks upon the point now being considered, does not show that he was ignorant, at the time of the institution of the suit at law, of the fact of delay having been given to the principal by the assignee of the bill single, but that he was not advised at the time that he possessed any legal defence to the suit. It is more a confession of ignorance of the law than of the fact. The bill of the complainant is therefore radically defective in failing to allege, and the proceedings in failing to show, this essential groundwork and preliminary to the nature of the relief claimed.

The foregoing view of the case makes it unnecessary to review and consider the validity or sufficiency of the consideration upon which the agreement for delay is alleged to have been contracted.

The decree must be reversed, and a decree entered in this court by consent of appellant, given subsequently to the reversal.

HAMILTON C. PAYNE et al. *vs.* JOHN GREEN.

In an action of trespass, the defendants asked the court to instruct the jury that if they believed that the defendants acted by summons of an officer to

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assist him in executing legal process, and did not exceed their authority in their acts, they should find for the defendants; *held*, that the instruction was legal and proper and ought to have been given; legal process is as much a justification to those summoned to aid an officer in executing it, if they do not commit excesses, as to the officer.

Charges must be given with reference to the evidence before the jury, they must be applicable to the state of case made out.

P. and others were sued in trespass, in five counts, for five different trespasses; the declaration charging the trespasses to have been committed *on a certain day, and on divers other days, between that and another day;* the defendants plead *not guilty*, generally, and the parties agreed that any special matter might be given in evidence which might have been pleaded; the plaintiff proved several trespasses by the defendants, all committed within the time laid, some committed while an officer was present with a search-warrant, and they were by his summons aiding him in the search, and others, before the officer was present; the defendant on the trial asked the court to instruct the jury that if they believed the defendants acted by summons of the officer to aid him in executing his warrant, and they did not exceed their authority, they must find for the defendants: *Held*, that under the pleadings and proof the instruction was applicable and ought to have been given.

The plaintiff in trespass by alleging trespasses to have been committed on a certain day, and on divers other days between that and another day, makes the *time* a descriptive part of the trespass, opens the door for proof as to any trespass committed within that time, but excludes all others.

Where there are several counts in a declaration in trespass, and a general plea of not guilty, with leave given to give any special matter in evidence that might be pleaded, the plea will be as broad as the declaration, and will be considered as justifying to the counts collectively and separately and to each trespass, where the counts are so framed as to include more than one trespass.

It is right that the jury should have the law explicitly laid down to them; and if the court below refuse an instruction which is the law and applicable to the case, the high court of errors and appeals will reverse the judgment notwithstanding the circuit court may have given other instructions from which inferentially, by mere inference of law, as a consequence, the proposition of law embodied in the refused instruction, might have been drawn.

In error from the circuit court of Lafayette county; Hon. Hugh R. Miller, judge.

John Green, on the 17th day of February, 1841, sued Hamilton C. Payne and seven others in trespass *vi et armis*, in the circuit court of De Soto county. The first count alleged that "on the fourth day of July, 1840, and on divers other days,

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and times between that day and the commencement of the suit in De Soto county, defendants broke and entered the close of the plaintiff, &c." The second count alleged that "the defendants on the days and years aforesaid" seized, took and carried away certain property of the plaintiff, &c. The third count "that on the days and years aforesaid," they assaulted Adela Green, the wife of the plaintiff; the fourth count "that on the 20th of February, 1841," they assaulted and beat the plaintiff; the fifth count "that on the day and year last aforesaid" they assaulted and beat the plaintiff and Samuel Green, a minor, his son. The defendants appeared and plead not guilty to the whole declaration; and it was agreed that the defendants might give any special matter in evidence which might have been pleaded; and the plaintiff any special matter which might have been rejoined. After various mis-trials and continuances the venue was changed, on the application of the defendants, to Lafayette county, in April, 1846.

At the October term, 1846, a trial was had in that county, and a verdict rendered for the plaintiff for the sum of $2250. A motion was made for a new trial and refused.

It is not necessary to set out all the evidence given on the trial. It will be sufficient to state but a portion of it. Elizabeth Berry, a daughter of plaintiff, stated that in the fall of 1840, the defendants, with others, some twenty in number, came to her father's house, climbed over his fences, entered the yard, and avowed their determination to drive him from the neighborhood, &c.; after staying some time, they went off up the road, and in a short time returned with W. L. G. King, an officer, who was not with them before; when they came the second time they said they had a search-warrant to search for a mill-band, &c., and the search accordingly took place; some time after this, all in the fall of 1840, the defendants came again, the plaintiff being from home, and took possession of a negro of the plaintiff's, and were guilty of other trespasses, &c. Nancy Scheeltz, another daughter of plaintiff, proved similar facts as to the defendants entering the close and house of plaintiff, before the officer came with the warrant, and their subsequent

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return at a different time, and their conduct on those occasions, which need not here be further detailed. David Berry, the husband of the first witness, was present when the search under the search-warrant was conducted, and saw nothing wrong. It was in September, 1840. This was the substance of plaintiff's testimony.

The defendants introduced George Foote, who was mayor of Hernando, and *ex officio* justice of the peace, who proved that on the 12th of October, 1840, he issued a warrant to search the premises of John Green, charged with stealing a mill-band belonging to Edward Orne; that he deputed Washington L. G. King as an officer to make the search; he also issued a warrant for the apprehension of a slave named Jim, of Green's, charged with larceny, and deputed King to serve it. This warrant was produced, and was indorsed, "executed Oct. 13th, 1840, W. L. G. King." W. L. G. King testified that he was the officer who served the warrants; he summoned the defendants to aid him; the record recites that "the defendants then read the warrant in their justification with the returns;" and the witness King proceeded to state that the execution of the warrants was accomplished in an orderly manner; no improper language, nor threats, nor insolence, used, &c.; the slave, Jim, was taken before the magistrate and whipped for the larceny. Many other witnesses were examined, but for the proper understanding of the opinion of the court their evidence need not be stated.

The court, at the instance of plaintiff, instructed the jury:

1. That in giving damages they had a right to consider of the motives of the trespassers and if they were found to be malicious and to proceed from a reckless disregard of the rights of others, they could give vindictive damages:

2. If process be used to cover oppression and trespass, it is a circumstance of aggravation and not of justification.

3. The entry of a crowd into the yard of another, in a threatening attitude, is a trespass.

4. Persons, when in the service of legal process, by going in unusual numbers, and acting in a rude and threatening manner, may become trespassers.

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For the defendant the court gave these charges:

1. An officer, to whom process is directed, must judge whether aid is necessary to the execution of that process, and citizens are required to obey his summons when called on by the officer.

2. If the prosecution in this case before the magistrate was malicious, and without probable cause, an action will lie against the prosecutor for damages.

The court refused to give these:

1. If the jury believe that the defendants acted by summons of an officer, to assist him in executing legal process, and did not exceed that authority in their acts, then they must find for the defendants.

The defendants sue out this writ of error.

T. J. Word, for plaintiffs in error,

Cited 2 Greenl. Ev. 272, 273, § 88; Ib. 634; 3 Term Rep. 292–296; 8 John. R. 69; 13 Ib. 444; 5 Wend. 240; Ib. 170; 5 Cow. 176; 3 Phil. Ev. Cow. and Hill's notes, 1207, n. 859; Ib. 1219, n. 862; How. & Hutch. 430, § 21.

Watson, for defendant in error,

Cited 14 Pet. 448; 5 Cow. 173; 9 Ib. 840; 5 How. Miss. R. 495; 11 East, 451; 6 How. Miss. R. 46; 2 S. & M. 388; 6 Ib. 218; 8 Ib. 401; 13 Ohio 508, 522; 3 Day, 447, 450; 2 Hump. 140; 7 S. & M. 270; 2 Caines' R. 85; 10 John. 451; 7 How. Miss. R. 328; 1 S. & M. 22; 4 Ib. 193; 8 Ib. 298; Graham on New Trials, 301, 302, 305.

H. W. Walter, for plaintiff in error, in reply,

Cited 3 Phil. Ev. Cow. and Hill, 1207; 3 Term R. 153; Ib. 535; 1 Chit. Plead. 152, 214; 5 How. Miss. R. 495; 3 Wend. 418; Ib. 102; 15 Ib. 647; 5 Ib. 191; 3 Dev. 485; 11 Pick. 348; 11 Wend. 83; 3 Bing. 319; 10 Barn. & Cres. 145; 8 S. & M. 145; 2 Greenl. Ev. § 278; Ib. 89; Peake's Ev. 505; Buller's N. P. 89; 2 Ired. Law Rep. 216; 2 Greenl. Ev. § 272–286; 4 Hawk's Law and Eq. 61; 7 How. Miss. R. 365; 2 Hayw. 53; 2 Ired. Dig. 802; 1 Greenl. Ev. § 86.

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Mr. Chief Justice SHARKEY, delivered the opinion of the court.

This was an action of trespass *quare clausum fregit*. The declaration contains five counts for different trespasses, and the defendants pleaded *not guilty* generally, and it was agreed that they might give any special matter in evidence which might have been pleaded. The jury found for the plaintiff $2,250 damages, and the case comes up on exceptions taken during the trial, as well as from a refusal to grant a new trial.

The court refused to give two charges asked by defendants, the first of which was, that if the jury believed the defendants acted by summons of an officer to assist him in executing legal process, and did not exceed their authority in their acts, they should find for the defendants.

The principle contained in this charge is undoubtedly a plain legal proposition. Lord Mansfield said, in *Cooper* v. *Booth*, cited 2 Starkie's Ev. 819, it would be a solecism to say that the legal execution of a legal warrant could be a trespass. The defendants had given in evidence a search-warrant, and proved by the officer that they had been summoned by him to assist in its execution. It was as much a justification to them as to the officer, if they did not commit excesses.

But it is said the court was not bound to give this charge, because the plaintiff had proved a trespass committed before the officer was present with his warrant. Charges should always be given with reference to the evidence before the jury. They must be applicable to the state of case made out. It is true that the defendants cannot justify under the process for acts committed before the officer arrived; but the state of the pleadings must have an important bearing on this question. In each count, except the fourth, the trespasses are charged to have been committed *on a certain day, and on divers other days, between that another day*. The effect of so laying the trespasses in the declaration, is to make the time a descriptive part of the trespass, and to open the door for proof as to any trespass committed within that time, but to exclude all others. 16 Mass. R. 470; Gould's Plead. 106. Now what were the pleas? Under the argument the defendants must be considered as justifying to

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the counts collectively and separately, and to each trespass. In other words, the plea is as broad as the declaration. The plaintiff did introduce proof of several trespasses, some committed before the officer was present and some after. The defendants justified as to each under a search-warrant. It was, therefore, a question of fact for the jury whether the defence was proved as to all the trespasses, or only to part. The question of law was, whether trespassers can justify under a warrant; the question of fact was, whether the defendants had acted under process in every instance. The plaintiff was seeking to recover for several trespasses; the defendants could give an excuse for some, but not for others. The plaintiff had so framed his declaration as to admit proof of several trespasses within a given time, and the defendants had a right, under the pleadings, to defend in the same way, by proving justification as far as they could. If the plaintiff had laid separate trespasses in separate counts, the defendants would have been required to answer each, and then the charge asked would have been improper as to trespasses not justified.

The only point in reference to this charge, on which a doubt could be raised, is, whether it had not been given in substance in the preceding charge, which was, that "an officer to whom process is directed must judge whether aid is necessary to the execution of that process, and citizens are required to obey his summons when called on by the officer." Whilst it would seem to follow as a consequence, that they would be excused when acting under a summons, which they were bound to obey, yet this is a mere inference of law, and it was proper that the jury should have been more explicitly informed. The first charge seems to have been but a preliminary, or foundation to the second.

As on this ground the judgment must be reversed, it is unnecessary to notice others. There is no principle of law presented which must necessarily arise in a second trial.

Judgment reversed and cause remanded.

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JOHN H. HAND ET AL. *vs.* PRIOR M. GRANT.

Where persons purchase real estate at sheriff's sale, they will not be heard afterwards to say that they were ignorant of conveyances made by the defendant in execution, before the date of the judgments under which they were buying, if those conveyances were on record in the proper office in the county; such record was constructive notice, and the law fixes on the purchasers a knowledge of what they were buying.

If a sale take place under three executions, and either of the judgments on which they issued bind the property of the defendant, it is sufficient to pass his interest to the purchaser; though neither of the other judgments bind the property.

Caveat emptor is the rule in sheriff's sales; and a purchaser thereat cannot be permitted to say that he obtained less than he supposed he was buying.

Where persons are seeking to be relieved from the payment of money bid by them for property at sheriff's sale, on the ground that the defendant in the execution had no *salable* interest in the property purchased; and it appears that one of the executions bound the property sold, the purchasers, if they allege that execution was paid, must show affirmatively that it was paid before the sale.

A sheriff sold property of J. under three executions against him; it was bought by H., who did not pay the purchase-money; the sheriff sued him, and recovered a judgment against him therefor, which H. sought to enjoin on the ground, that he had become a judgment creditor of J. of elder date than two of the executions under which he bought, and that as the sheriff had not paid the amount of their bid over, in equity it ought to be appropriated to the judgment they had: *Held*, that the judgment creditors, under whose executions the property was sold, though junior in date, had a prior equity to the fund.

ON appeal from the district chancery court at Columbus; Hon. Henry Dickinson, vice-chancellor.

John H. Hand and John H. Huddleston filed their bill, stating that on the 16th day of March, 1840, Pryor M. Grant, as sheriff of Lowndes county, sold lots 5 and 6, in Square one, north of Main street, in Columbus, under these *fi. fas.*, viz.

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William M. Cozart against James Jones, judgment rendered 9th April, 1839; Silas Bronson against Jones, rendered on the same day; and James Sims against Jones, rendered on the 19th June, 1838, which latter judgment has been paid up and discharged. The lots were leasehold property, being leased for ninety-nine years; and that complainants became the purchasers at the sum of $3005; they declined to pay their bid. Grant instituted suit thereon, and recovered judgment for $3738.30. It was taken to the high court of errors and appeals, and the judgment affirmed with damages.

Upon consultation with counsel, and an examination of the records, they are satisfied that they are entitled to relief; that the materiality of the matters relied on in the bill were brought to their knowledge within a few days previous to its being filed.

The matters are as follows: — On the 18th February, 1837, James Jones, the defendant in execution, conveyed to David T. Porter one undivided half of said lots 5 and 6; and on the 5th June, 1837, made a deed of trust on the same to A. W. Sorsby. On the 19th July, 1838, Jones conveyed the whole of said premises to Brown and Puller, trustees for the Real Estate Bank, and on the 28th February, 1839, he conveyed the same premises to Butterworth, in trust for Ames. That the deeds in trust were in full force at the time of levy and sale; Jones had no such interest at the time of levy and sale as could be sold under execution, and the sale was therefore void. That Grant had long since ceased to be sheriff, and no steps had been taken to make him accountable on said judgments, and the sale thereon. The judgment in favor of Grant was not subject to the lien of any judgment at law against Jones, but was equitable assets of Jones, subject to be pursued in equity by judgment creditors, according to their priority of lien; that they hold and own a judgment against Jones, in the name of the Commercial Bank, rendered on the 29th of June, 1838, for $8018.88, which has priority of lien. That Jones conveyed the same premises to Murdock, as trustee for complainants, on the 4th of May, 1839, and also to Brown, as trustee, on the 10th of July, 1839.

The prayer of the bill was, that judgment in favor of Grant

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might be enjoined perpetually, and for all other and further relief.

To this bill the defendant filed a general demurrer, which was sustained by the vice-chancellor.

Complainants appealed.

Richard Evans, for appellants, argued at length in support of the bill, and cited 1 Com. on Cont. 9; *Lansing* v. *Quackenburgh*, 5 Cow. 38; *Thornhill* v. *Gilmer*, 4 S. & M. 153; *McIntyre* v. *Agricultural Bank*, Freem. Ch. Rep. 105; *Osgood* v. *Franklin*, 2 John. Ch. R. 23; *McLaughlin's Adm'rs* v. *Daniel*, 8 Dana, 183.

Harris and *Harrison*, for appellee, cited 2 Yerg. 394–397; 9 Ibid. 97; 2 Bay, 171; 2 Murph. 291; 1 Carrington L. R. 280; 1 Alab. R. 359; 6 Ibid. 204; 7 Ibid. 175.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Grant, as sheriff, had executions in his hands against one Jones, which he levied on two town lots, and the complainants became the purchasers at $3005, and so indorsed on the executions. They failed to pay their bid, whereupon he sued them at law and recovered judgment in the circuit court, which was brought to this court and affirmed. 5 S. & M. 508. They now file this bill for relief against that judgment, and allege that Jones had but a lease on the lots for ninety-nine years, and that he had parted with his interest before the sale, so that he had nothing which the sheriff could sell, and they have therefore acquired no title whatever; hence they ask to be relieved against the judgment, on the ground that they were not apprized of these facts until a few days before the filing of the bill.

Grant sold under three executions, one in favor of Sims, on a judgment rendered 19th of June, 1838, the other two on judgments rendered 9th of April, 1839.

Jones, it is alleged, had conveyed away half of his interest in the lots on the 28th of February, 1837. On the 19th of July, 1838, he made a conveyance of the whole of the interest, in

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trust for the benefit of the Real Estate Banking Company, and on the 28th of February, 1839, he again conveyed the whole to Butterworth, in trust for the benefit of Ames.

On this state of facts, assuming all the conveyances to be valid, it is apparent that when the first judgment was rendered against Jones, he held but a moiety of the lots. When the other judgments were rendered, he had disposed of the whole interest in trust. Why he conveyed away more than he had is a circumstance not explained.

In the first place, the parties cannot be heard to say they were ignorant of these conveyances, because they were all on record in the proper office in the county. This was constructive notice, and if they had not actual notice, the fault is theirs. The law fixes on them a knowledge of what they were buying.

As they bought under three judgments, if any one of them bound the property of Jones in the lots, it is sufficient to pass his interest to complainants. Sims's judgment was older than the deeds of trust, though younger than Jones's conveyance of the half of his interest in the lots to Porter. Jones, at the date of this judgment, was joint owner, and to that extent the complainants acquired title. As they are chargeable with notice of the several conveyances, the law supposes they made their bid in view of the true state of title, and agreed to give the amount bid for Jones's interest in the lots. *Caveat emptor* is the rule in such cases, and they cannot be permitted to say that they got less than they supposed they were buying.

To obviate this difficulty, it is now alleged that Sims's judgment *is* paid. This may be true, and perhaps a presumption of payment would arise in regard to the others, as the sheriff charged himself by his return. But they do not say *when* or *how* it was paid. The bill is evasive in this particular. It can avail them nothing if this execution has been paid since the levy and sale. It is certain the sheriff sold under this execution, and the law presumes that he did his duty. If he acted illegally, and made a levy and sale under an execution which had been paid, the party who alleges a prejudice thereby must establish the fact.

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Again, it is said that Grant has paid none of these judgments, and that complainants have also become judgment creditors of Jones, by assignment, and that their judgment has priority of lien over all except the judgment of Sims, and that in equity they are entitled to have their own judgment satisfied out of the judgment of Grant against them. It is sufficient to say that their judgment was not levied, and even junior judgments are entitled to be satisfied out of the proceeds of a sale made under them. The plaintiffs in the executions under which the lots were sold, have a prior equity to the fund.

The case cited from 5 Cowen is not strictly applicable. The sheriff had then by mistake sold the property of one man, supposing it to belong to another; the court refused to interfere on motion, but said the proper remedy was in chancery. On the ground of mistake they were clearly entitled to relief, but there is no such feature in this case.

Decree affirmed, and bill dismissed.

Reddrick Smith *vs.* Ivey Herring.

The defendant in an attachment has no right, by plea in abatement, or otherwise, to contest the truth of the fact alleged as the ground of the attachment, where the affidavit and the proceedings appear on their face to be regular and sufficient; upon the performance of certain requisitions the statute gives the writ; if wrongfully sued out the defendant has his remedy on the bond; the truth of the affidavit is not traversable.

In error from the circuit court of Lowndes county; Hon. Hendley S. Bennett, judge.

Reddrick Smith, on the 8th of December, 1843, made affidavit that Ivey Herring owed him $2,733.33, on a judgment of the circuit court of Barbour county, Alabama, and that "he absconds, so that the ordinary process of the law cannot be served upon him." Smith gave bond, with surety, in the regular form; and an attachment regularly issued, which was levied on slaves.

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At the return term of the attachment the declaration was filed, to which Herring plead in abatement, "that on the 8th December, 1843, he did not abscond, and was not absconding, so that the ordinary process of the law could not be served on him." This plea was sworn to. Smith demurred to the plea; the demurrer was overruled; the suit abated, and judgment rendered against Smith for costs. He sued out this writ of error.

J. M. Graybill, for plaintiff in error.

1. A plea in abatement traversing the facts on which an attachment issues, is not allowed by any well settled principle of the law. If the process of the court has been abused by wrongfully suing out the writ in this case, the defendant has a full and ample remedy. Suit upon the plaintiff's bond will afford redress in damages, and if he has sworn falsely he is subject to the pains of perjury. 3 Rand. 148; 7 Leigh, 660; 5 Stew. & Porter, 158; 1 Hayw. N. C. R. 365; 2 Nott & McCord, 130. Justice Clayton, in 7 Howard's R. 602, has most clearly intimated an opinion that such a plea is bad. And, in the same case, Chief Justice Sharkey has directly determined that the facts of the affidavit on which an attachment issues, cannot be traversed by plea. Ib. 506, 507.

2. The judgment of the court should not have been final upon overruling the demurrer. *Respondeat ouster* was the correct judgment. How. & Hutch. 614.

A. Hutchinson, on same side, relied on the same points.

Adam G. Smith, for defendant in error.

1. This court has, in effect, decided the plea a good one. *James* v. *Dowell*, 7 S. & M. 333.

2 The cases in North Carolina, where such a plea has been held bad, depend on the peculiar statute of that state. 1 Rev. Stat. N. C. 71; Ib. 155, § 56. Where no such statutes exist the plea has been held good. 3 Stew. 226. It is true in 5 Stew. & Port. 158, the correctness of the case in 3 Stew. is called in

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question, yet it is not reversed; the judges give no opinions. See also 2 Hen. & Munf. 312; 3 Rand. 148.

Mr. Justice THACHER delivered the opinion of the court.

The plaintiff instituted an action against the defendant, as an absconding debtor, by the process of attachment. The defendant pleaded in abatement, traversing the allegation of his absconding, as contained in the affidavit. A demurrer to this plea was overruled, and a judgment, abating the action, given in the circuit court.

The principle to be decided is, whether a defendant in attachment has a right, by plea in abatement, to contest the truth of the fact alleged, as the ground of the attachment, where the affidavit and the proceedings appear on their face to be regular and sufficient.

The statute makes it the duty of the judge, or justice, to issue the process of attachment, if the affidavit required by law and the bond, are made and executed by the plaintiff. Upon a performance of these requisitions, a plaintiff becomes entitled to the process. This privilege he obtains from the statute, which also protects the defendant, in the event of its abuse by the plaintiff, by affording him a remedy on the bond, in case the writ is wrongfully sued out. The truth of the affidavit is not a traversable fact in the action commenced by attachment. 5 Stew. & Port. (Ala.) 158.

In the case of *James* v. *Dowell*, 7 S. & M. 333, the point decided was, that the statute (How. & Hutch. 597, § 43,) which makes it lawful for a defendant, in any suit, to plead as many pleas in bar of the action as he shall choose, although some of said pleas may be to the party, or to the character of the parties suing, includes pleas in abatement, if they be for different causes of abatement.

The judgment is reversed, the demurrer sustained in this court as it should have been in the circuit court, with a judgment of *respondeat ouster* in the circuit court, under which the defendant must plead to the merits of the action.

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ELIJAH S. WATSON ET AL. *vs.* FISHER A. HANNUM ET AL.

The vendee of land, subject to execution against the vendor, is substituted to the right of redemption, which the vendor enjoys under the first section of the redemption law of 1842; and when the land is sold under the execution against his vendor, he may redeem it according to the statute.

Where land has been sold under execution, which the defendant in execution had subsequent to the judgment against him, but prior to the sale under execution, sold to a third party, such vendee will have the right under the redemption law to redeem the land from the sheriff's vendee; and where another judgment-creditor of the defendant, in the first execution, has redeemed the land from the sheriff's vendee, the first vendee will have the right to redeem from such judgment creditor by paying him the amount he paid the sheriff's vendee and the statutory interest; but in such case the judgment-creditor will have the right to advance on his bid, and if he is willing to credit his execution with or pay, more than the first vendee is willing to pay, he will hold the land; if otherwise, the first vendee can still redeem from him.

It seems that under the redemption law, when the defendant in execution, or his vendee, wishes to redeem land sold under execution, which land the sheriff's vendee has already conveyed to a judgment-creditor of the defendant in execution, who has redeemed it from the sheriff's vendee, the defendant in execution, or his vendee, must tender their redemption money to such judgment-creditor, or if he be a non-resident, to the sheriff of the county; yet if the vendee of the defendant in execution, before the expiration of the two years allowed for redemption, files his bill for redemption against all the parties, and offers to pay whatever redemption money is due, it will be a sufficient offer to redeem, and the chancery court should then compel the judgment-creditor to state the *ultimatum* to which he will advance his bid, and submit that to the conclusion of the defendant in execution's vendee.

Where property has been sold under execution in favor of a bank, the notes of which are at a depreciation, and a judgment-creditor of the defendant in execution has redeemed from the sheriff's vendee, by paying the agreed value in specie, of his bid, which was paid in the notes of the bank, the defendant in execution, or his vendee, in seeking to redeem, need only tender to the judgment-creditor the amount in good money with the statutory

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interest, which the judgment-creditor paid the sheriff's vendee, and such additional sum as the judgment-creditor may be willing to advance on his bid.

In error from the district chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Archibald Cameron, Elijah S. Watson, and Elkana Sawyer, state in their bill, that on the 7th of March, A. D. 1842, Watson sold and conveyed to Cameron, for the sum of thirty-two hundred dollars, certain land described in the bill; the deed being recorded on the 5th of April, 1842, and exhibited with the bill; that Cameron contracted with Sawyer to sell him the land, gave him a bond for title, on payment of the purchase-money, and delivered to him the possession; when Cameron bought the land, he knew it was subject to the lien of certain judgments against Watson, rendered in Carroll county, in October, 1840. On the 31st of October, 1842, an execution issued on one of these judgments in favor of the Mississippi Union Bank, by virtue of which the land was sold on the 5th of December, 1842, for the notes of the bank, and bought by Treadwell S. Ayres for the sum of twelve hundred dollars; the notes of the bank being then worth from ten to twelve cents on the dollar; the sheriff gave Ayres a deed, which is exhibited with the bill.

On the 4th of March, 1843, Ayres executed a deed of the land to Fisher A. Hannum, of the state of Tennessee, a copy of which is exhibited with the bill; from which it appeared that Hannum had redeemed the land, by paying him twelve hundred dollars in the notes of the Mississippi Union Bank.

That in November, 1842, or May, 1843, Hannum obtained judgment in the federal court at Jackson, Miss.; and employed Ayres, as his counsel, to secure that land for him. Before Hannum had redeemed the land, or had paid Ayres any money for that purpose, Watson tendered Ayres fifteen hundred dollars in the notes of the Union Bank, in payment of the redemption money for the land; and John A. Young, as agent for Cameron, tendered and offered to pay that amount, as the redemption money, about the same time. Ayres, not objecting to the form

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of tender, refused to accept it, saying that Hannum, as a judgment creditor of Watson, had applied to redeem the land, but not pretending that he had then paid the money; this was before the execution of the deed to Hannum.

The bill proceeds, "they also now tender and offer to pay to said Hannum and Ayres, the amount due for the redemption of said land, as may be decreed by this court, and which they now pay into court as it may direct." The bill proceeds to propound special interrogatories, and prays that Hannum may be enjoined from prosecuting an action of ejectment which he has commenced against Sawyer; the deeds to Hannum and Ayres be cancelled, and for general relief.

The bill was filed on the 6th of October, A. D. 1844.

Ayres answered the bill; and states that on the 8th of June, 1842, Hannum obtained judgment against Watson, in the circuit court of the United States, at Jackson, for $3,873.33; in November, or December, 1842, Hannum gave Ayres a power of attorney to collect and secure the debt; after Ayres bought the land, he informed Hannum of it, and that he could redeem the same, as a creditor of Watson's. Hannum requested him to advance the money necessary for its redemption; and early in January, 1843, he wrote to Hannum that he had done so; and in February, 1843, Hannum sent him a check on New Orleans for three hundred dollars, which he received as full compensation for the twelve hundred dollars in Union Bank money, which he had paid. He being the purchaser of the land, and agent of Hannum, considered the redemption by the latter as made from the time he was requested to redeem the same, and so wrote to Hannum, early in January, 1843; from that time the land belonged to Hannum, and he relied on Hannum, and not the land, for the amount he had paid out. On the 1st of February, 1843, he executed the deed to Hannum, which was filed for record in March.

He admits that Watson tendered him the fifteen hundred dollars in notes of the Union Bank, and his refusal of it; he states he refused because Hannum had already redeemed the land, and he told Watson he could redeem it by paying Han-

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num's judgment, and not otherwise; he admits the tender by Watson was made before Hannum had repaid him what he had paid out for Hannum, but he states the tender was after he had advanced the money for Hannum. He states, also, that he believes the deed to Hannum was executed before the tender was made; when the tender was made, he considered Hannum the owner of the land.

Fisher A. Hannum also answered the bill, setting up in substance the same facts stated in the answer of Ayres.

It was in proof, that Watson, as agent for Cameron, on the 15th of February, 1843, tendered to Ayres, agent for Hannum, the fifteen hundred dollars in notes of the Mississippi Union Bank, for the purpose of redeeming the land; and that Ayres refused to allow him to redeem, unless he would pay the amount of the execution in favor of Hannum against Watson and others.

This was all the proof, and the case was submitted upon it, the pleadings and exhibits. The vice-chancellor dismissed the bill, and the complainant sued out this writ of error.

Sheppard, for plaintiff in error.

1. Under the second section of the redemption law, Hannum could not redeem or have the benefit of the act, as Watson had no interest in the land at the time of the sheriff's sale. *Elliott* v. *Patton*, 4 Yerg. R. 14.

2. The right to redeem passed to Cameron; the deed to Hannum shows that he redeemed with Union Bank money. Cameron tendered a greater amount than the sum paid, with interest. This was sufficient, and entitled Cameron, who stood in the place of Watson, to the land.

3. The redemption law, in its application to judgments before its passage, is constitutional. *McGehe* v. *Handley*, 5 How. (Mi.) R. 625; *Marlow* v. *Pickens*, 2 S. & M. 428. The redemption law and valuation law stand on the same basis.

4. The case of *Bronson* v. *Kinzie et al.* 1 How. S. C. R. 329, is predicated on the ground that the right of the mortgagee is fixed by the terms of the contract, and the law of Illinois, being

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inconsistent with those terms, could not be enforced. That objection does not apply to the law of 1842, of this state. The purchaser of the land acquires the right to instant possession and profits; and gets his money and interest to case of redemption, he is not in the least delayed.

J. K. Lea, for defendants in error.

1. Cameron was not a *bona fide* creditor of Watson; that is, he was not a judgment creditor, and therefore had no right to redeem under the redemption act. *Woods* v. *McGavock*, 10 Yerg. 133.

2. Cameron's application, through Watson, to redeem, was made *after* the sale to Hannum, and redemption by him; it was therefore too late.

D. Shelton, for Hannum.

1. The particular relief prayed for is the cancelment of the deeds to Ayres and Hannum; under the prayer for general relief the complainant cannot have relief inconsistent with his particular relief; the redemption from Hannum is inconsistent with the general relief prayed for, and therefore cannot be decreed. 2 Paige, 396; 14 Johns. R. 529-560; 1 Ves. Jr. 426; 5 S. & M. 745.

2. Cameron, when he offered to redeem, was not of the description of persons authorized to do so by the act; none but the *debtor* and a *bona fide creditor* may redeem. If the construction be allowed that a purchaser from the debtor is substituted to his rights, it will afford great facilities for fraudulent collusion between the debtor and a pretended sub-purchaser, to the entire defeat of the creditors.

3. Cameron did not make such a tender as Ayres was bound to accept, even if he had then been the holder of the interest bought by him. Ayres paid the money in the notes of the bank, it is true; but their value was daily fluctuating, and there is no proof that the fifteen hundred dollars tendered were equal in value to the amount paid by Ayres, when he paid it;

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Ayres had a right either to good money, or at least to the value in good money, of the notes be paid with interest.

4. Hannum's redemption was in advance of Cameron's tender, and therefore Cameron could only redeem from Hannum, and not from Ayres. See the 5th section of the act.

Mr. Justice THACHER delivered the opinion of the court.

In March, 1842, Cameron purchased a tract of land of Watson. At this time the land was subject to the lien of certain judgments against Watson, in favor of the Mississippi Union Bank. Cameron gave Sawyer a bond to make him a title to the land, and put him in possession. Afterwards, in December, 1842, the land was sold at sheriff's sale, under the judgment; and Ayres, the attorney of the bank, became the purchaser of the land for the bank, for the sum of $1200, in the notes of the bank, then valued at from ten to twelve cents on the dollar. On the 1st day of February, 1843, Ayres made a conveyance of the land to Hannum, resident in Tennessee, who had redeemed the land, as a creditor of Watson, by judgments obtained against him in June, 1842. Hannum, shortly after the purchase by Ayres at the sheriff's sale, had authorized Ayres, and requested him to advance the amount necessary to redeem the land. Ayres subsequently took from Hannum a check for $300, in full for the $1200 in the notes of the Mississippi Union Bank. After Ayres had acted thus in this behalf for Hannum, and on the 15th day of February, 1843, Watson, as agent for Cameron, tendered Ayres $1500 in the notes of the Mississippi Union Bank, for the purpose of redeeming the land, which Ayres refused. The prayer of the bill is, that the deeds of Ayres and Hannum may be cancelled, and that they be required to reconvey the land, and for appropriate relief.

The vice-chancellor decreed the dismissal of the bill.

Cameron, by the purchase of the land from Watson, became substituted to the right to redeem, which Watson enjoyed under the first section of the Redemption Law of 1842. *Elliot* v. *Patton*, 4 Yerger, 10. Hannum had redeemed the land from the purchaser under the judgment of the bank against Watson,

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at the expense of $300, which was received as full consideration for the redemption. This was the first redemption made of the land. Probably, the application of Cameron, through Watson, as his agent, to Ayres, to redeem the land, should have been made rather to Hannum, or as he is a non-resident, to the sheriff of the county. But the bill of Cameron was filed within the two years allowed by law for redemption, and, as Hannum is a party, it may properly be viewed as an application to redeem the land. In his bill, Cameron tenders such an amount as may be due in redemption, which is equivalent to a bid of the amount paid by Hannum, and the statutory interest. The third and fourth sections of the redemption law are designed to keep the real estate sold under execution open for bids from the execution-debtor and his creditors, for the space of two years. Unless, therefore, Hannum is willing to advance upon his bid, by expressing a willingness to make a greater credit upon his execution against Watson, Cameron is entitled to redeem upon the terms made by Hannum with Ayres, together with the interest and expenses, as provided by the law. All parties being in court, Hannum must be allowed to state his *ultimatum* price, and that be then submitted to Cameron, or his representatives, for their conclusion.

Decree reversed, and cause remanded for further proceedings.

RUFUS CARTER ET AL. *vs.* WILLIAM T. BURRIS.

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A bill of sale of a slave absolute on its face may be shown by parol proof to be a mere mortgage for the security of money due by the vendor to the vendee.

The admission of the vendee that an absolute bill of sale of a slave held by him was not absolute, but the vendor was to have the slave when he paid the vendee the amount due him, coupled with the facts that the vendee did not take possession of the slave until two years after the date of the bill of sale; and that the vendor paid the vendee a part of the sum due him, after the execution of the bill of sale, was *held* sufficient to show that such bill of sale was a mere mortgage for the payment of the money due by the vendor to the vendee.

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On appeal from the district chancery court at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

The facts are sufficiently stated in the opinion of the court.

Buckner and *Moore*, for appellants, cited *Lane* v. *Dickersen*, 10 Yerg. R. 373; *Grider* v. *Graham*, 4 Bibb, 70; Eq. Dig. 567; *McDonald* v. *Neilson*, 2 Cow. 139; *Mason* v. *Baker*, 1 A. K. Marsh. 209; Eq. Dig. 590.

William and *William G. Thompson*, on the same side.

McNutt and *Paxton*, for appellee.

Mr. Justice Thacher delivered the opinion of the court.

Burris filed his bill in the vice-chancery court, in which he charged that in 1839 he became indebted to William Carter in the sum of $269.10, for which amount he made, and gave Carter his promissory note; and that in May, 1843, in order to secure Carter for the payment of the note, and at his request he executed to him a bill of sale of a slave valued at $600, the said Carter making his promissory note to Burris for the difference in the amount, after deducting from the estimated value of the slave the amount of the promissory note of Burris, together with the interest accrued thereon. The bill charged further, that the bill of sale, although absolute upon its face, was in reality designed to be but a mortgage, and that Carter delivered to Burris the promissory note of Burris, to be credited, from time to time, by any payments made by Burris. The bill was filed by Burris to redeem the slave, and it was so decreed in the vice-chancery court.

The question is as to the bill of sale, whether it was absolute or designed as a mortgage only.

The evidence of the numerous witnesses tends most strongly to show that the sale was not absolute, and to confirm the ground assumed in the bill. Hayden testifies that "Carter told him that the sale was not absolute, but that Burris was to have the slave when he paid the amount due Carter." Again, Car-

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ter did not take possession of the slave until 1845, and then only, as the proof seems to exhibit, as hired from Burris. And, again, sometime after the execution of the bill of sale, Burris paid Carter the sum of $40, which was credited on the note of Burris in the handwriting of Carter. The evidence of the witnesses and the circumstances occurring in the case sufficiently substantiate the allegations of the bill.

Decree affirmed, and cause remanded.

JOHN C. HINES, Administrator of Green W. Drake, deceased, *vs.* THE STATE OF NORTH CAROLINA, use of John H. Vick, Guardian of Louisa C. and Josiah Vick.

The State of North Carolina is entitled, as a corporation, to institute actions in this state.

Under the statute of this state, which authorizes a foreign guardian whose wards have estates in this state, to apply to the probate court, having jurisdiction, and file a certified copy of his letters of guardianship under the seal of the court granting the same, which provides that upon the guardian's giving bond as required the court shall grant him all the rights and privileges exercised by other guardians, a guardian who has complied with the statute may prosecute, in this state, an action for the use of his wards against the surety of a former guardian on his guardianship bond, given in another state, and payable to that state according to its laws, the suit to be brought in the name of that state for the use of such guardian.

And in the declaration, filed by such guardian on such bond, the allegation that the suit was brought "by order and direction of the court of pleas and quarter sessions for the county of Nash and state of North Carolina" may be treated as surplusage; the declaration elsewhere showing the guardian's right by virtue of his proceeding in the probate court of this state.

Where, in a bill of exceptions, taken in an action on a bond, to the admissibility in evidence of the bond, under the plea of *non est factum*, it is recited that the *signature* of the obligor was proved, and the bond recites that it was "sealed," and opposite to the name of the obligor, in the copy of the bond in the bill of exceptions, is written the word "*seal*," *held*, that there was nothing in the bill of exceptions that showed that the bond was not actually sealed, or that a substitute for a seal was employed.

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Hines v. The State of North Carolina.

Where a bill of exceptions is imperfect in not setting out all the testimony with reference to the execution of a bond, whose admission in testimony is complained of, the high court of errors and appeals will presume that the court below properly admitted it on due proof of its execution.

In error from the circuit court of Octibbeha county; Hon. Francis M. Rogers, judge.

The declaration was in these words, viz.:

"The state of North Carolina, that sues for the use of John H. Vick, guardian of Louisa C. Vick and Josiah Vick, orphans, under the age of twenty-one years, by attorney, complains of John C. Hines, administrator of the estate of Green W. Drake, deceased, of a plea that he render unto said plaintiff the sum of six hundred dollars, which from said plaintiff he unjustly detains. For that whereas the said Green W. Drake, in his lifetime, together with Arthur Whitfield and William W. Algood, on the 7th day of August, A. D. 1835, at the county of Nash, in the state of North Carolina, made and executed his certain bond, sealed with his seal, and signed by him by the name and signature of G. W. Drake, (and now here brought into court by the order and under the authority of the court of pleas and quarter sessions, for the said county of Nash, as by reference to the record of the minutes and proceedings of said court annexed to said bond more fully appears,) the date of which bond is the day and year aforesaid; and thereby he, the said Green W. Drake, in his lifetime, acknowledged himself, his heirs, executors and administrators to be held and firmly bound unto the said state of North Carolina, in the just and full sum of three hundred pounds of the current money of said state, being equivalent to six hundred dollars (written —— three hundred pounds) to be paid to the said state, to which said bond a condition is annexed to the following effect: That whereas the said Arthur Whitfield had, on the day of the date thereof, been appointed by the said court, guardian to Louisa C. Vick and Josiah Vick, orphans of Josiah Vick, deceased, if the said Arthur Whitfield, guardian as aforesaid, shall well and truly discharge his guardianship by taking care of and improving all the estate belonging to said orphans, and shall settle his guardianship accounts

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with the court of said county of Nash, as required by law, and that he well deliver up to each orphan, when they shall attain lawful age, all such estate as they ought of right to be possessed of, or sooner, if required, agreeably to the true intent and meaning of the act of the general assembly, in such case made and provided, then this obligation to be void, otherwise to remain in full force and virtue."

The declaration then proceeds to assign breaches: 1. That Whitfield received a specific legacy of $250 due them, and converted it to his own use; 2. That he obtained $500 of their estate, and moved with it out of North Carolina, and never accounted for it; 3. That he embezzled and wasted their estate; 4. That he used the assets of their estate, and went to parts unknown, upon which commissioners were appointed by the court of pleas and quarter sessions to audit and settle his guardianship accounts, who reported to the court, that on the 14th day of November, A. D. 1843, Whitfield was indebted to his wards in the sum of $461.17; which report, according to the laws of North Carolina, was confirmed by the court; the said Whitfield having fled the state, the judgment became absolute, and it was ordered that suit be instituted against Hines, the administrator of Green, by which means the writing obligatory became forfeited, &c., wherefore the suit was brought.

To this declaration a demurrer assigning ten special causes was filed; before its disposition, at the May term, 1845, the plaintiff filed an amended declaration which commenced in this way: "The State of North Carolina, that sues by order and direction of the court of pleas and quarter sessions for the county of Nash, and state of North Carolina, for the use of John H. Vick, guardian of Louisa C. Vick and Josiah Vick, orphans, under the age of twenty-one years, by and under the authority and appointment of the probate court of Octibbeha county, and state of Mississippi, by attorney, complains, &c."

The declaration proceeded to assign breaches similar to those in the first declaration: and in the last breach assigned, referred to the transcript of the record of the proceedings against Whit-

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field in the court of pleas and quarter session, duly authenticated and then brought into court.

The defendant again filed ten special causes of demurrer to the declaration. The demurrer was overruled, and leave granted him to plead. He plead *non est factum* by his intestate. On the trial the plaintiff offered the bond sued on in these words, viz.:

"State of North Carolina:

"Know all men by these presents, that we Arthur Whitfield, Green W. Drake, James Walker, and William W. Algood, are held and firmly bound unto the state of North Carolina in the just and full sum of six three hundred ——— pounds, current money of the said state, to which payment, well and truly to be made, we bind ourselves and every of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this the 11th day of August, A. D. 1835.

"Whereas the above bounden Arthur Whitfield hath been this day by the worshipful court of Nash county appointed guardian to Louisa C. Vick, and Josiah Vick, orphans of Josiah Vick, deceased;

"Now the condition of the above obligation is such, that if the said Arthur Whitfield, guardian, as aforesaid, shall well and truly discharge his guardianship by taking care of and improving all the estate belonging to the said orphans, and shall also settle his guardianship accounts with the court of said county, as required by law, and that he will deliver up to said orphans as aforesaid, when they shall attain lawful age, all such estate as they ought of right to be possessed of, or sooner if required, agreeably to the true intent and meaning of the act of the general assembly, in such case made and provided, then this obligation to be void, otherwise to remain in full force and virtue.

A. Whitfield. [Seal.]
W. W. Algood. [Seal.]
G. W. Drake. [Seal.]
[Seal.]"

The plaintiff proved, by two witnesses acquainted with the handwriting of Drake, that the signature to the bond of his

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name was in his handwriting and the bond was admitted in evidence. The defendant excepted; the bill of exceptions did not state that no other evidence of the execution of the bond was offered but that of the two witnesses who proved the signature.

The plaintiff then offered to read the transcript of the record of proceedings in the court of pleas and quarter sessions, the substance of which was as follows, viz.: "On the 13th of November, 1843, that court appointed three commissioners to audit and settle the accounts of Arthur Whitfield, who was guardian of Louisa C. Vick and Josiah Vick, infant orphans of Josiah Vick, deceased, from the 11th day of August, 1835 to the 14th day of February, 1838, when John H. Vick was appointed guardian of said orphans." The commissioners were further required to report what was due by him as guardian. On the 15th of November, 1843, they made their report that he was in debt by reason of his guardianship to his Wards in the sum of five hundred and sixty-one dollars and sixty-six cents.

The record proceeds as follows, viz.: "Which said report being seen and considered by the court, is confirmed in all respects; and it appears to the court that Arthur Whitfield left this state in the early part of the year 1838, insolvent, and that William W. Algood . . . . is insolvent; and that the other security, Green W. Drake, removed to the state of Mississippi, and is dead, leaving property; it is ordered by the court that the present guardian of said orphans, put the bond of said Whitfield, Algood and Drake in suit, and that he institute a suit in the name of the State of North Carolina against the estate of the said Drake, in the circuit court of the county of Octibbeha, state of Mississippi. And it is ordered by the court that the original bond of Arthur Whitfield and his securities be delivered by the clerk of the court to the present guardian, John H. Vick, for the purpose of suit, the clerk taking and retaining a copy of the same. And it appearing to the court that said Whitfield had been grossly negligent in discharging his duties as guardian, it is declared by the court and so ordered that said Whitfield is entitled to no commissions for or on account of his guardianship." This was the whole record.

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The clerk of the court certified, under seal of the court, that the transcript was a faithful one "of the proceedings made at November term of our said court, at its session, November 13, 1843."

Jesse H. Drake, "chairman of the court of pleas and quarter sessions, and presiding magistrate for the county of Nash," certified to the official character, &c. of the clerk.

The defendant objected to the admissibility of this record; the objection was overruled and he filed a second bill of exceptions.

The plaintiff then offered to prove, by Moses Westbrook and Belfield Starke, the value and nature of North Carolina currency, mentioned in the declaration, and the value of the three hundred pounds. The record states that these "witnesses stated that they did not know what the law of North Carolina was upon the subject, or any general custom existing throughout said state, fixing or regulating the value or nature of such currency as pounds, but that in the neighborhood and in the county in which they lived, and in several adjoining counties, so far as they had any knowledge, such currency was calculated at ten shillings to the dollar, or two dollars to the pound." The defendant objected to this evidence, which was all that was offered by the plaintiff as to the value of the "*pound*" inNorth Carolina currency. The objection was overruled, and he took his third bill of exceptions.

The jury found a verdict for the plaintiff, and assessed his damages at $488.49, and the defendant sued out this writ of error.

Harris and *Harrison*, for plaintiff in error.

1. The demurrer to the amended declaration was improperly overruled. *Corporation of Washington* v. *Young*, 10 Wheat. 406; 3 Yerg. 479; 5 Mass. R. 191; 13 Ibid. 260; 2 Day, 559; 2 Amer. C. L. Rep. 430; *Pickering* v. *Fisk*, 6 Verm. 102; 5 Ham. 218; 1 U. S. Dig. 437, § 100.

2. The court erred in permitting the instrument purporting to be a bond to be read in evidence. The execution of it was

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in issue, and the only proof as to the genuineness of it was evidence of the hand-writing of *one* of the parties. There was no proof of a sealing or delivery, or that the bond was ever in the possession of the state. 6 Peters, 124; 1 Stewart, 136; 4 J. J. Marsh. 572.

No local law was adduced giving to the letters "L. S." the force of a seal in North Carolina. The statute of this state upon the subject does not reach beyond our own territory. *Bank of Rochester* v. *Gray*, 2 Hill's N. Y. R. 228.

3. The bond offered in evidence was void for uncertainty. 1 How. 198.

4. It was variant from the one declared on in several particulars. That sued on was for *three* hundred pounds; that offered in evidence was for *six three* hundred; that sued on is alleged to have been executed in the *county of Nash*, in the state of North Carolina; the one produced does not purport to have been executed in said county; the declaration uses the words, the "court of pleas and quarter sessions," &c.; the bond only the "worshipful court of Nash."

5. No suit can be maintained against the security upon the bond. *Frazier* v. *Frazier's Executors*, 2 Leigh, 642; 2 Wash. 160; 1 Tucker's Com. 278; 5 Cond. R. 727; Pet. C. C. R. 46; 15 Peters, 187.

6. The transcript of the proceedings *at the November term*, 1843, of the "worshipful court of Nash," was improperly admitted. The whole proceedings were irregular, without notice, without the jurisdiction of the court, and void. They also vary from the case alleged.

7. The evidence in relation to the "North Carolina currency" should have been rejected.

C. F. Miller, for defendant in error.

1. The declaration alleges Vick to be guardian appointed by the probate court of Octibbeha; this the statute allows, (H. & H. 340, § 18); and he was instructed to sue by the court of pleas and quarter sessions; this is sufficient authority.

2. Whitfield had fled the state of North Carolina; it was im-

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possible to proceed further against him in that state than the court there did proceed; the record fully sustained the allegations of the declaration on that subject.

3. As to the alleged variance between the bond and declaration, see 7 How. (Mi.) R. 176, 243; 3 S. & M. 64; 4 Ibid. 649; 1 Stark. Ev. 494; 2 Ibid. 479; 1 Chit. Pl. 305; Hol. Tenn. Dig. 73; 5 John. R. 84; 8 Ibid. 392, 410.

4. The only plea was *non est factum;* performance is not in issue under that plea. Tidd's Prac. 196, 511. Under the pleadings the *bond* being proved, the case was on writ of inquiry as to the rest, and the exceptions therefore taken *on the trial of the plea* were not warranted by the pleadings.

5. It is said an administrator may give any matter in evidence under the *general issue;* that is true, but *non est factum* is not the general issue to an action on a bond, with breaches assigned.

Mr. Justice THACHER delivered the opinion of the court.

An action of debt was instituted by the state of North Carolina for the use of Vick, guardian, against Hines, administrator of Drake, surety of Whitfield, a former guardian. The action was founded upon the guardianship bond of Whitfield.

A demurrer filed to the declaration was overruled in the circuit court. Of the specified causes of demurrer, but one seems to be relied upon in this court in the brief of counsel for the plaintiff in error. This specification is, that the declaration shows no sufficient legal authority for the institution of the suit.

The state of North Carolina is entitled, as a corporation, to institute actions in this state. The suit, also, was instituted for the use of Vick, guardian, who, having authority under our statutes, by filing his foreign letters of guardianship in this state and taking out letters here, and being in possession of the bond, could cause suit to be instituted upon it. The allegation that the suit was instituted "by order and direction of the court of pleas and quarter sessions for the county of Nash, and state of North Carolina," may be regarded as surplusage, since our statute provides an authority to such a guardian to pursue the remedy here sought to be applied. H. & H. 340, § 18.

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The bond upon which the action was founded, being offered in evidence, was objected to by the defendant. The plea was *non est factum*. The signature of the defendant's intestate was established by two witnesses. As the bill of exceptions sets it out, the bond has the word "seal" against the name of the defendant's intestate signed thereto, and the body of the instrument declares it to have been executed as a specialty. There is nothing in the bill of exceptions that manifests that the bond was not executed with an actual seal, or that shows that any substitute for a seal was employed. It is only from the brief of counsel that we learn that the letters "L. S." were substituted for a seal, from whence it is insisted that some local law of North Carolina should have been exhibited authorizing a substitution for an actual seal. So far, therefore, as this court is informed by the record, the instrument was executed by actual sealing. This bill of exceptions, it may likewise be remarked, is imperfect in setting forth all the testimony as to the proof of the execution of the instrument, and the court having admitted it in evidence, we are required to consider that all necessary preliminary proof was duly adduced.

The foregoing points are all which, upon examination, seem to call for observation. Some of the others are not legitimately raised in the state of the pleadings.

Judgment affirmed.

DAVID POINTER ET. AL *vs.* JAMES F. TROTTER.

The fourth article of the treaty with the Chickasaw Indians provides, in substance, that while many of the Indians were capable of managing their own affairs, yet others were not, and might be imposed on; therefore none of the reservations admitted under the treaty should be sold, leased, or disposed of, without the certificate of *at least two* of seven named persons, of whom five signed the treaty for the Indians, that the party owning or claiming the reservation was capable of managing and taking care of his affairs; which fact should also be certified by the agent, and also that a fair consideration had been paid: one of the seven persons, the certificate of two of whom was re-

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quired to make a sale valid, sold his reservation without having procured such certificate: *Held*, that the spirit of the treaty did not embrace those who were by the treaty itself appointed to judge of the capability of others, and that the sale by him, without such certificate, would be valid.

On appeal from the circuit court of Marshall county; Hon. Hugh R. Miller, judge.

James F. Trotter sued David Pointer and Willis M. Lea on a bond for the sum of twenty-four hundred dollars.

They plead, in substance, that the consideration of the bond was the sale by plaintiff to the defendants of a section of land described, and that the plaintiff at the time represented that he had a good and valid title to the land; but that in fact he had no title, and so the consideration had wholly failed.

The plaintiff replied, that on the 10th of May, the United States granted a patent to Henry Love for the land, and that Love, on the 6th of June, 1843, conveyed the land by deed to him, duly acknowledged and recorded, whereby a perfect title was vested in him, which he had conveyed to the defendant.

The defendant rejoined, that Henry Love was an Indian of the Chickasaw tribe, and became entitled to the section of land as a reservation under the provisions of the 6th article of the treaty, between the United States and the Chickasaw tribe, of the 24th of May, 1834, and that no certificate of any two of the seven chiefs or commissioners named and appointed in and by the 4th article of the treaty, nor any certificate of the Chickasaw agent, nor any approval by the president of the United States or by any person by him designated, had ever been made or indorsed upon the deed executed by Henry Love to the plaintiff, as required.

The plaintiff surrejoined, that the said Henry Love was one of the chiefs of the Chickasaw tribe of Indians, and the same person who was appointed by the 4th article of the treaty as one of the seven chiefs or commissioners, some two of whom were required to make the certificate mentioned.

The defendants demurred to this surrejoinder; the court overruled the demurrer, and gave leave to plead over, which the

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defendants declining to do, the court gave judgment against them for the amount of the note and interest; and they appealed.

James M. Greer, for appellants.

W. F. Stearns, for appellee, insisted that the true construction and spirit of the treaty did not require those who had been selected as competent to certify to the capacity of others, to obtain certificates of their own capacity. The seven chiefs named were necessarily exempt from the operation of the provision which required the certificate of two of their own number. He cited *Lewis & Niles* v. *Anderson & Orne*, 5 How. Miss. R. 365.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

To an action of debt, the plaintiffs in error pleaded failure of consideration. The writing obligatory, it seems, was given for a tract of land, and the pleadings narrow the question down to a single matter of law, which depends on the construction of the 4th article of the treaty with the Chickasaw Indians, a part of which is in these words: "The Chickasaws desire to have within their own direction and control, the means of taking care of themselves. Many of their people are quite competent to manage their own affairs, but some are not capable, and might be imposed upon by designing men; it is therefore agreed that the reservations hereinafter admitted, shall not be permitted to be sold, leased, or disposed of, unless it appear by the certificate of at least two of the following persons, to wit: Ish-ta-ha-to-pa (the king), Levi Colbert, George Colbert, Martin Colbert, Isaac Albertson, Henry Love, and Benjamin Love, of which five have affixed their names to this treaty, that the party owning or claiming the same is capable to manage and take care of his affairs, which fact, to the best of his knowledge or information, shall be certified by the agent; and furthermore, that a fair consideration has been paid; and thereupon the deed of conveyance shall be valid, provided the president of the United States, or such other person as he may appoint, shall approve the same, and indorse it on the deed," &c.

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The defendant purchased of Henry Love, and the question is, whether, as to him, the certificates mentioned in the 4th article were necessary to enable him to make a valid conveyance, he being one of the persons appointed to certify to the capacity of others.

As a general rule, the certificates constituted prerequisites to a good title. This was decided in the case of *Niles & Lewis* v. *Anderson & Orne*, 5 How. 365; though the title from the Indian was there sustained as an equitable title, but the complainants had been prevented from obtaining the proper certificates by the fraud of the opposite party.

On a strict construction of the treaty, and an observance of its letter, the certificates would seem to be required in all cases. The provision applies to all reservations thereafter to be admitted. But if we construe it by its spirit and policy, the case before us would seem to constitute an exception to the general rule. The object of the article is plainly indicated by the language used in its commencement. The Chickasaws desired to have the means of taking care of themselves. Many of their people were competent to manage their affairs, but others were not, and might be imposed upon. The design was to protect those who were incapable of taking care of their property; protection to that class was the object. They could not be designated in the treaty. Competent persons were therefore appointed to determine who were and who were not capable of judiciously disposing of their property. Such persons were authorized to make valid conveyances; incompetent persons cannot convey, at least that seems to be a consequence. What then was necessary in order to enable a party to convey? He must produce evidence of his competency to do so, and the treaty points out what evidence is required. It prescribes the means by which the fact is ascertained, and in requiring the certificate of persons therein named, as to a matter in which judgment alone is to determine, it thereby admits that those persons possess the required capacity. As to them the treaty itself furnishes the evidence of the fact, which they are required, by the exercise of judgment, to furnish as regards others. This is

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a provision which was designed for the body of the people. This view is fortified by other considerations. These individuals, or most of them, constituted the delegation that made the treaty; in which capacity they acted as the chosen representatives of the tribe. If they were capable of ceding the whole territory, they must be capable of conveying their reservations. In the treaty, the obligations of the tribe to them are acknowledged, and specific reservations made to each as a compensation for their services. They are not within the mischief intended to be guarded against, and the reason and spirit of the provision do not apply to them. The acknowledgment that some of the Indians were incapable of managing their affairs, could never have been intended to embrace these individuals. We are therefore disposed to adopt that construction in this instance which best comports with the spirit of the treaty. A different construction would be embarrassing in its consequences, without any beneficial result. The treaty establishes a sort of guardianship for incompetent persons.

Judgment affirmed.

ABIJAH D. HUNT *vs.* RICHARD NUGENT.

Where a suit was instituted against the maker and indorsers of a note, and, at one term of the court, previous to the trial, verdict and final judgment in the case were rendered, an order of continuance as to one of the indorsers, and of final judgment as to the other parties was made, to which no objection at the time was taken; but, subsequently, when the cause came on for trial, the suit was dismissed as to those against whom the final judgment had been previously taken, and a verdict and judgment rendered against the indorser alone, as to whom the continuance was entered; no bill of exceptions being taken to the trial and judgment against the indorser; it was *held*, that the verdict and judgment against the indorser were properly taken, and should not be set aside.

Whether, if the declaration aver that due legal notice of protest was given, it will be sustained by proof, that diligent search was made in order to ascertain the indorser's residence, but in vain; —*Quære.*

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Hunt v. Nugent.

A note, dated January 1, 1837, at Cayuga, in Hinds county, fell due February 1, 1838, at the Grand Gulf Bank, at Grand Gulf, Claiborne county, it was protested for non-payment at maturity, and suit brought upon it against the indorser; on the trial, it was proved, that in January, 1838, the indorser had *removed* to a place in Hinds county, two miles and a half from Utica post-office in that county, and six miles from Cayuga; there was no evidence of the previous place of residence of the indorser; the notary, who protested the note, inquired of the officer of the bank where it was payable, to what point he must direct his notice, and was informed to Cayuga, and he accordingly did so: *Held*, the notice was sufficient to bind the indorser.

In error, from the circuit court of Jefferson county; Hon. Stanhope Posey, judge.

Richard Nugent sued D. F. Standler, as maker, and Joseph S. Ellison, Abijah D. Hunt and W. G. Guice as indorsers, of a note, under the act of 1837. The declaration described the note as dated January 1, 1837, for $1000, due on the first of February, 1838, at the Grand Gulf Bank, at Grand Gulf, in Claiborne county, and alleged demand at the bank on the day of maturity, and due notice to the indorsers.

Suit was commenced to the May term, 1844, of the circuit court. The writ was executed on Standler, 4th of January, 1844, and duplicates sent to Hinds county, which were executed on Hunt, on the 20th of March, 1844, and returned "not found" as to Ellison and Guice. An *alias* was ordered by the court, at the November term, 1844, for Guice, which was returned "not found." No *alias* was ordered for Ellison. At the May term, 1844, of the court, the defendant, Hunt, by attorney, appeared and pleaded *non assumpsit*, and the cause was continued; and again continued, at the May term, 1845. At the April term, 1846, the following entry was made: "This cause was continued as to A. D. Hunt; it is therefore considered by the court, that the plaintiff recover of the said defendants, the sum of $908, for his damages in this behalf sustained, and also for his costs herein expended."

At the October term, 1846, the record recites as follows, viz.: "Discontinued as to Ellison and Guice. Now came the parties, by attorneys and a jury, to try the issue between plaintiff and

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defendant, Hunt being called, came, to wit, &c.; who, being duly impanelled, &c., find that said defendant, Hunt, did assume, &c., and assess the plaintiff's damages at $889.15;" upon which the court rendered judgment against Hunt accordingly.

At the same term, this motion was made, viz.: "Motion to set aside verdict in this case, because the same is contrary to law and evidence."

The motion was overruled.

The following motion appears in the record.

"Motion to set aside the following entry on the minutes at the April term, to wit, 'continued as to Hunt, and judgment by default final for the sum of $908. It is therefore considered by the court, that the plaintiff recover of the defendants the sum above mentioned, and also costs;' and correct said entry according to the judge's entry on his docket, so as to read, 'Judgment by default against David F. Standler, and continued,' the entry, at the last term of this court, on the minutes, being a clerical error, contrary to the entry in the handwriting of the judge, on the docket."

Underneath this motion, in the record, are written the words, "Motion continued."

Then follows in the record the bill of exceptions of Hunt to the refusal to grant a new trial. It begins in this way, viz.:

"Be it remembered, that on the trial of the above cause, defendant Hunt proved by the testimony of Hensaw and McClure, that on 1st day of February, 1838, said Hunt's nearest and usual post-office was at Utica, in Hinds county, and that that post-office was but two and a half miles from Hunt's residence, while the post-office at Cayuga was six miles distant; and that said Hunt moved to said residence in January, 1838, and has since resided there."

The plaintiff proved by Lewis Craney, that he, as a notary public, protested the note sued on; the note was duly protested for non-payment, on the day it fell due, after a demand at the Grand Gulf Bank, of the teller; that he did not know the residence of Hunt, the indorser, but inquired where it was payable at the bank, and was instructed by the officers of the bank to

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send notice to Cayuga, Hinds county, to which place he sent the notice, by depositing it in the post-office in time to go by the next mail.

This being all the evidence, the court instructed the jury, at the request of the plaintiff, that,

"If the jury believe, from the testimony, that the notary, when he protested said note and sent notice, did not know where the indorsers resided, and used reasonable diligence to ascertain by inquiry where such parties resided, notice sent to them, directed to the place where said note is dated, is sufficient."

The court, at the request of defendant, gave the following instruction, to wit: "The court will charge the jury, that if they believe, from the evidence, that the notary did not use reasonable diligence to ascertain the residence and post-office of defendant, Hunt, before sending notice to Cayuga; and that no notice of protest of said note was sent to Hunt after his nearest post-office was ascertained, either by the notary or owner of the note, then the jury must find for the defendant; and that the question of reasonable diligence is a matter to be decided by the jury alone.

2. That if the jury believe, from the evidence, that the notice of protest was sent to defendant, Hunt, at Cayuga post-office, in Hinds county; and that, at the time, Hunt's post-office was at Utica, and that his nearest and usual post-office was Utica, then they must find for the defendant; unless they believe, from the evidence, that the holder used reasonable diligence to ascertain his post-office, and failed to ascertain the same.

Hunt, alone, sued out this writ of error, and assigned the following errors, to wit:

1. The court erred in continuing the cause, at April, 1846, as to Hunt, one of several defendants, and indorsers of the note, and at the same time entering up a final judgment against the defendants, generally.

2. The refusal of the court below to set aside the verdict, on application of Hunt, on the ground that the verdict was contrary to law and evidence, was erroneous.

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3. The court erred in admitting evidence as to the diligence used by the notary to ascertain the residence of the indorser, Hunt; the declaration containing a positive allegation of due notice to him, and not alleging facts and circumstances dispensing with due notice.

Amos R. Johnston, for plaintiff in error.

1. The judgment in April, 1846, against the maker and first and second indorsers of the note, and continuance as to Hunt, and the judgment against Hunt, at October, 1846, were erroneous. A judgment is an entire thing, incapable of division; but the judgment against the maker, in April, is one judgment, and that against the indorser in October, is a second judgment; two *fi. fas.* might issue, one on each judgment, and a double satisfaction be had. The subsequent dismission was as to the two indorsers on whom process was not served, but against whom judgment had been previously rendered; the judgment against the maker remained. *Prewett* v. *Caruthers*, 7 How. (Mi.) R. 304; *Falconer* v. *Frazier*, 7 S. & M. 235; *Davis* v. *Tiernan*, 2 How. (Mi.) R. 805.

2. The evidence of the notary did not establish the liability of the indorser; a new trial should have been granted. Bay. on Bills, 2d Am. edit. 280; *Beveridge* v. *Burgis*, 3 Campb. 262; *Barnwell* v. *Mitchell*, 3 Conn. 101; *Bank of Utica* v. *De Mott*, 13 Johns. R. 432; *Reid* v. *Payne*, 16 Ib. 218; Story on Bills, 334, § 299; Chitty on Bills, chap. x. 516, 524, 525, (8th edit. 1833); 3 Kent's Comm. (5th edit.) 109; *Fisher* v. *Evans*, 5 Binn. R. 542; *Bateman* v. *Joseph*, 12 East's R. 433; *Hoopes and Bogart* v. *Newman*, 2 S. & M. 71; *Godley* v. *Goodloe*, 6 Ib. 255.

3. There is no correspondence between the *allegata* and *probata;* the allegation is of due notice; the proof, of diligent search, yet failure to give legal notice. This is not sufficient. *Hoopes and Bogart* v. *Newman*, 2 S. & M. 71.

J. B. Thrasher, for defendant in error.

1. The first and third assignments of error cannot enter into

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the consideration of this court, because they are not presented by bill of exceptions. *Commercial Bank of Manchester* v. *Martin's Heirs*, 9 S. & M. 613; *Doe ex dem. Helm* v. *Natchez Ins. Co.* 8 Ib. 205; *Neeley* v. *Planters Bank*, 4 Ib. 113; *Sessions* v. *Reynolds*, 7 Ib. 130.

2. The objection to the rendition of the judgment against Standler cannot avail Hunt; Standler is no party to this writ of error; he alone can complain of the wrong, if it be wrong judgment against him. Hunt, by going to trial, as to himself, on his own plea, waived all previous errors or objections; none of which were excepted to at the time. See Smedes's Digest, 77, and authorities cited.

3. The disagreement alleged to exist between the averments and proof, does not in fact exist; notice was sent on due inquiry; this is legal notice; and is not the case of inquiry and failure to find residence, and not sending notice. *Chapman* v. *Lipscombe*, 1 Johns. R. 294. But evidence of diligence is admissible under the allegation of notice. Chit. on Bills, 389; 2 Smith's R. 223, 224.

4. The notice actually sent was good, legal notice, sufficient to bind the indorser. *McMurtrie* v. *Jones*, 3 Wash. C. C. R. 206; *Moodie* v. *Morrall*, 1 Sou. Car. R. 307; *Bank of Utica* v. *Phillips*, 3 Wend. R. 408.

5. The question of diligence was for the jury; they have decided it; it should not be disturbed. *Dickson* v. *Parker*, 3 Dan. 219; *Harris* v. *Holliday*, 4 Ib. 338.

Mr. Justice THACHER delivered the opinion of the court.

This was an action of assumpsit, instituted against the maker and indorsers of a promissory note.

At a term previous to the trial, verdict and final judgment of the cause were rendered, an order of continuance of the cause, as to one defendant, and of final judgment as to all the defendants, was made in the circuit court. No objection to this proceeding was made at the time, but at a subsequent term the cause came on for trial, and the order referred to seems to have been disregarded by parties. The action was then dismissed as to the de-

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fendants in court, excepting the present plaintiff in error, against whom a verdict and judgment, as indorser, were rendered. At the time of the trial, there was a clear waiver of any error, from the fact of going into trial without objection, even if any could have availed by claiming exceptions at the time the order was made. The proceedings in a cause constitute a whole, and it is the final judgment, in such a case, which binds a party upon which it operates. No prejudice can by possibility happen to the other defendants, as to whom the action was ultimately dismissed; and the plaintiff in error is the party as to whom the cause was continued in the above-mentioned order, and to which order he certainly has no good ground of complaint; there is no bill of exceptions, embracing this point.

Two other objections were made to the legality of the judgment against Hunt, the defendant below. These consist of the objection that legal notice of protest was not given to him as indorser, and that, while the declaration avers that due legal notice was in fact given, the proof shows merely diligent search, in vain, to ascertain his real residence, which does not support the averment.

Upon the second point, it may be remarked that in this case a notice was actually sent, and it is not a case of a failure to send notice, after diligent and vain search to ascertain the residence of the indorser. But this point, also, is not made by the bill of exceptions.

The only question, therefore, now is, as to the sufficiency of the notice actually sent. The facts were these: The note was dated at Cayuga, which was proved to be in Hinds county, the 1st day of January, 1837, and matured on the 1st day of February, 1838. It was proved that the defendant removed to within two miles and a half of the post-office at Utica, Hinds county, in January, 1838, and that Cayuga post-office was six miles from the residence to which he had removed. The note was payable at the Grand Gulf Bank, and the notary, not being informed of the residence of the defendant, inquired of the officers of the bank where to send the notice of protest, and was by them directed to send the notice to Cayuga post-office,

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which was done. There was no evidence as to the residence of the defendant at the time of the making of the note, or his indorsement thereof, or any time until January, 1838.

The removal of the defendant to the neighborhood of Utica, from all that appears, might have taken place on the last day of January, which was the eve of the maturity of the note, and, clearly, without a further showing of information of such removal, or publicity given to it previously, a notice there could not be required. The question is consequently narrowed down to the inquiry whether, while the note was dated at Cayuga, was payable at the bank, and its officers, upon being asked, directed the notice to be sent to Cayuga, the notice was sufficient.

The notary was directed, at the place where the note was made payable, to send the notice to the place where the note was dated. The information he received was direct and positive. It was given to him at the place where it was most natural for him to inquire, that is to say, the place where the parties had agreed the note should be payable. He had no reason to doubt but that the information he received was certain, because it was given without hesitation, and not as a mere opinion. He was put at rest upon the subject. In the case of *Chapman* v. *Lipscombe*, 1 Johns. 294, the plaintiff made inquiries in New York to ascertain the residence of the drawer, and of those whom he supposed most able to inform him. He notified, according to his information, although wrongly. He was considered to have used all the diligence required.

In the case at bar, under all the peculiar circumstances, we think the notice was sufficient.

Judgment affirmed.

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OSBORNE R. EAKIN ET AL. *vs.* JOHN DOE ex dem. SAMUEL B. VANCE ET AL.

In case of a lost or destroyed record, parol evidence is admissible of its contents, especially where no higher evidence is shown to exist.

Therefore, in an action of ejectment, where the defendant relied on a purchase at administrator's sale, of the premises in controversy, it is competent for him to show by the clerk of the probate court, that citations had been regularly issued for those interested in the premises, as the statute requires, but that they had been lost or mislaid.

If, however, the record of the court be not lost, it is not competent to prove by parol that *an order of sale* was made by the court; such order, if made, should have been placed upon the record; if there, it could not be proved by parol, if not there, parol proof could not supply it.

Where, therefore, in an action of ejectment the defendant relied on a purchase at administrator's sale of the property, and offered to prove, by parol, that citations had regularly issued according to the statute, but had since been lost, and also that an order of sale of the premises had been made by the court, and the circuit court refused to permit the proof of either to be made, and the jury found for the plaintiff; *held*, that although the court below should have permitted the proof of the loss of the citations, yet as that proof would not have availed the defendant, without the order for the sale, which could not be established by parol, the judgment must be affirmed.

ON appeal from the circuit court of Holmes county; Hon. Morgan L. Fitch, judge.

John Doe, on the demise of Samuel B. Vance and others, heirs of David W. Vance, deceased, sued Osborn R. Eakin and Reuben Matthews, in ejectment, for a tract of land in Holmes county. A trial was had and verdict rendered for plaintiffs.

On the trial, the plaintiffs proved a title in their ancestor, and possession in the defendants. The latter then proved, by the records of the probate court of Holmes county, that John W. Myers was duly appointed administrator of David W. Vance's estate, in October, 1833. They read the entire record of the proceedings of Myers in his administration, from which it appeared, that at the May term, 1834, Myers suggested that Vance's

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personal property would not pay his debts, upon which the court ordered citation, for those interested in the realty, to appear at the July term, and show cause why the land should not be sold.

At the July term, it was ordered, that those interested in the lands should appear at the September term, and show cause, if they could, against the sale. At the August term, a similar order was made for them to appear at the October term of the same year. At the September term, a similar order was made for them to appear at the November term, in which the land, in controversy, was specifically mentioned.

The record shows no further proceedings, until the March term, 1835, when the following entry appears.

"An account of the sale of the real estate, belonging to David W. Vance, deceased, sold under an order of the probate court of Holmes county, on the 18th day of March, 1835, according to the statute in such case made and provided; to wit: (Here follows account of sales.)

"I do certify, that the foregoing contains a true and full account of the sale of the real estate of David W. Vance, deceased, sold by me under an order of the probate court of Holmes county, on the 18th day of March, 1835.

JOHN W. MYERS,

Administrator of David W. Vance, deceased.

"Received and ordered for record.

N. E. RIVES."

This was all the record of the probate court touching the sale of the land.

The defendant then offered to prove, by W. A. Purdom, who at the time the order of sale was obtained, was acting as clerk in the probate clerk's office; that citation was legally issued to all persons interested in the land; that the same was returned executed, and an order of sale of the land thereupon granted by the probate court; that these several orders, citations, &c., have been lost or mislaid, also that the land was duly advertised and sold by the administrator. This proof was excluded by the court. The defendant excepted and appealed.

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W. R. Miles, for appellant.

If a record be lost, it can only be supplied by parol; there is no other conceivable manner in which it can be done. To decide that it cannot be so done, will be to encourage those whose titles are defective, to destroy the record evidences of title in their adversary, and they are safe.

W. Brooke, for appellee.

The records of the country would cease to be "muniments of title" if they could be altered, abridged or enlarged by the recollections of their keepers. In this case, not only was it proposed to establish the records, but also legal inferences, as that the citations were duly issued, duly served, &c.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action of ejectment. The plaintiffs in the circuit court established a perfect legal title in their ancestor, their heirship, and possession of the defendant.

The defendants relied on a title derived from Vance's administrator, but the record of the probate court did not show that citations to persons interested in the real estate of Vance, had been issued as the statute requires, and, thereupon, the former clerk of the court was offered as a witness to prove that citation was legally issued to all persons interested, and returned executed, and an order of sale was thereupon made by the court. That the several orders, citations, &c., have been lost or mislaid. This testimony was excluded, and this decision of the court constitutes the only question in the case.

Whether it is competent thus to admit parol evidence, to supply the place of a matter of record, which has been lost, is a question not free from difficulty. The weight of authority seems to be in favor of its admissibility. Many cases on this subject are cited in note 723, 3 Phillip's Evidence, 1067. The rule deduced from them by the annotators is, that generally, in case of a lost or destroyed record, parol evidence is admissible of its contents, especially when no higher evidence is shown to exist. In 1 Greenleaf's Evidence, 581, the rule is laid down in

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terms equally broad. These learned writers have cited very much the same adjudged cases. By some of them they are sustained; by others they are not, to the full extent of the rule. Following, then, the rule thus established, we are inclined to hold, that parol proof of the issuance and due service of citations was admissible, in connection with clear proof of loss, under circumstances not implicating the party claiming the benefit of such testimony, in being instrumental in the loss.

But the defendants also offered to prove, by the witness, that an order for the sale of the land was granted by the probate court. If any such order was made, it should have been placed on record, and there is no pretence that the records of the court have been lost, other than the citations. Indeed, it does not appear, that such order was not placed on record. If it was, it could not be proved by parol, unless the record containing it had been lost. If it was not, it cannot be supplied by parol proof. That would be to substitute parol proof in lieu of record evidence, and to dispense with so much of the law as requires the proceedings of the probate courts to be recorded; to substitute witnesses for judgments.

The proof of the issuance of the citations would have availed nothing, without proof of the order of sale, and as this could not be made, the defendant's case could not be made out; under this state of things, no other judgment could have been given than for the plaintiff.

Judgment affirmed.

JAMES AGNEW ET AL. *vs.* RANSOM MCELROY.

A judgment between the same parties for the *same cause of action*, is conclusive between them; the exceptions to this rule are, where the first action was not competent, where the plaintiff has mistaken his character, or where the judgment is given for faults in the declaration and pleadings.

The plaintiff who brings a second action must show beyond all controversy that the second is a different cause of action from the first in which he failed.

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Nor does it make any difference that the latter suit is in a different form of action; if the *cause of action* was the same in each, the judgment in the first is conclusive; thus a judgment in trover is a bar to an action of assumpsit for the value of the same goods.

A. sued M. in assumpsit for the value of some cotton; M. plead that A. had sued him in trover for the conversion of the same goods, and in that suit it was the judgment of the court, that he take nothing and pay the costs expended; to this A. replied, that the conversion and not the title was in issue in the trial of the trover suit; on that trial, A.'s title was admitted; the merits of this suit were not tried and determined in that: *Held*, on demurrer to the replication, that it was not a good answer to the plea; and judgment on the demurrer was properly rendered for the defendant.

Where on demurrer to a replication in the court below, the replication is pronounced bad, and the plaintiff does not ask to amend, or plead over, and it appears from the plea pleaded and the replication, that not only the form but the substance of the latter was defective, and that the defect in the substance could not be supplied by any change in the form of the pleadings; the high court of errors and appeals would not reverse the judgment in order to allow an amendment in the court below, that the case might be tried on its merits.

In error from the circuit court of Lauderdale county; Hon. Henry Mounger, judge.

The facts are sufficiently stated in the opinion of the court.

Shields L. Heussey, for plaintiffs in error,

Cited 3 Phil. Ev. (Cow. & Hill's notes) 828, 836, 844, 845; 1 Stark. Ev. 262–264; Co. Litt. 352, *n.* 6; *Gardner* v. *Buckbee*, 3 Cow. Rep. 127; *Burgess & Davis* v. *Sugg*, 2 Stew. and Port. 342; *Shafer* v. *Stonebraker*, 4 Gill & John. 355; *Vooght* v. *Winch*, 6 B. & A. 662; *Pace* v. *Dossey*, 1 Stew. (Ala.) R. 20; *Hitchen* v. *Campbell*, 2 Wm. Black. 779; *Dutchess of Kingston's case*, 11 State Trials, 261; Story's Plead. by Oliver, tit. "*Recovery*," citing 3 Wils. 240; 2 Wm. Black. 779–831; *Hughes* v. *Blake*, 1 Mason, 515–519; 7 Bac. Abr. tit. "*Pleas*," 352; Co. Litt. tit. *Estoppel; Adams* v. *Broughton*, 2 Stra. 1078; Green. on Evid. 602–636; Loft on Ev. 533; *White* v. *Martin*, 1 Porter's Ala. R. 215; Peake's Ev. 36; Chit. Plead. 1, 228; Chit. on Cont. 612, 613, and the notes cited; Brown on Actions at Law, Lib. Sept. No. A. D. 1845, p. 558; Viner's Abr. tit.

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Judgment, 2; *Ferren* v. *Arden*, Cro. Car. 35; *Lacon* v. *Barnard*, 2 Ventr. 169; *Putt* v. *Rooster*, Cro. Eliz. 668.

C. R. Cliffton, on the same side.

L. Lea, for defendant in error.

1 Chit. Plead. (9th Am. ed.) 602-604; Cok. Inst. 260; *Hess* v. *Heeble*, 4 Serg. & Rawle, 246; S. C. 6 Ibid. 257; *Duffy* v. *Lytle*, 5 Watts, 120; *Brockway* v. *Kinney*, 2 John. Rep. 210; *Wheeler* v. *Van Houten*, 12 John. R. 313; *Bunnel* v. *Pinto*, 2 Conn. 433; *Rice* v. *King*, 7 John. R. 20; Chit. Cont. 612; 6 Bac. Abr. 705, 706; *White* v. *Martin*, 1 Port. R. 215; *Hite* v. *Long*, 6 Rand. 457; *Hitchen* v. *Campbell*, 2 Wm. Black. 827; Peake's Ev. 36; *Case of the Dutchess of Kingston*, Chit. on Cont. 613; Ibid. 611; 6 Bac. Abr. *Plea*, 635.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of assumpsit, brought by the plaintiffs in error, for the value of several bales of cotton. The defendant, amongst other things, pleaded "that the said plaintiffs had theretofore impleaded the defendant in a certain action of trover, to recover damages for the wrongful conversion of the same identical goods specified in this action, and such proceedings were thereupon had upon issue joined, and trial upon the merits between the parties to this suit, that by the consideration and judgment of the court, it was determined that the plaintiffs take nothing and pay the costs expended." To this the plaintiffs replied, "that the point in dispute in said suit of trover, being the wrongful conversion of, and not title to the said goods in said declaration named, and in defendant's said plea, which said title to the same was admitted by said defendant to be in said plaintiff, on the trial of the said suit in trover, the merits of the present suit were not tried and determined in said suit of trover." To this replication a demurrer was filed, specifying various causes; the court sustained the demurrer, and gave judgment final against the plaintiffs.

It is not at this day to be doubted, but that a judgment be-

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tween the same parties, for the same cause of action, is conclusive between them. There are exceptions to the rule, as where the first action is not competent, where the plaintiff has mistaken his character, or where the judgment is given for faults in the declaration or pleadings. *Hitchen* v. *Campbell*, 2 Wm. Black. 830. The principal consideration is, whether it be precisely the same cause of action in both appearing by proper averments in a plea; or by proper facts stated in a special verdict or a special case. Ibid. 830.

The recovery is *prima facie* evidence that the demand has been inquired into, but is not conclusive. The inquiry is, whether the same cause of action had been litigated and considered in the former action. The plaintiff who brings a second action, must not leave it to nice investigation to see whether the two causes of action be the same; he ought to show beyond all controversy, that the second is a different cause of action from the first in which he failed. *Seddon* v. *Tutop*, 6 T. R. 607; *Bagot* v. *Williams*, 3 Barn. & Cres. 235; 10 Eng. C. L. Rep. 62; *Rice* v. *King*, 7 Johns. 20.

It is immaterial that the form of action is different, if the cause be the same, the judgment is conclusive; as a judgment in trover, is a bar to an action of assumpsit for the value of the same goods. 4 Rep. 94, b; 2 W. Black. 827; 3 Ch. Pl. 929, n.

The party is not precluded from showing that the latter suit is for another and different cause, if the fact be so. By pleading the former judgment specially, the plaintiff is driven to take issue on a single point, and admit or deny the judgment, or deny that it was for the same cause of action. 3 Ch. Pl. n. 929; also 1159.

Tried by this standard, the replication in this instance was bad. It does not admit the judgment and deny that the cause of action was the same — but it denies, "that the merits of the present suit were tried and determined in the former." This does not come up to the point, for the true question is whether the merits of the second suit were involved, and might have been tried in the former action. If so, and the party failed, though his failure might have proceeded from some defect in the

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testimony, or some error in law, he cannot after judgment, reinvestigate the same matter in another suit. The judgment is conclusive. No one shall be twice harassed for the same cause, is a venerable and wise maxim of the common law.

In view of the act of 1840, there has been some difficulty in fixing on the proper judgment to be given in the case. See Pamph. Acts, 1840, p. 132. It is the object of that statute, to have every case disposed of upon its merits as far as practicable. See *Dent* v. *Coleman*, (ante 85) at this term of the court. Whenever, therefore, a case has been determined in the court below, upon defects of form in the pleadings, it would be proper to remand it, if enough appear in the record to show a probability that the merits are with the plaintiff in error. But on the other hand, where the pleading is not only defective in form, but moreover discloses defects in substance, which would probably be a bar to any recovery upon the merits, it cannot be the intention of the statute, that this court should reverse and remand the case; especially when no application for leave to amend was made in the court below.

In this cause, besides the defect in the form of the replication, the matter disclosed could not be put into any shape, which would take away from the defendant the benefit of his plea. We must suppose the plaintiff set out the facts, upon which he relied. Those facts defeat this right of recovery. If true, they show that the first judgment was erroneous, and might have been reversed. His remedy was a writ of error, not a new action. They do not show, that by any possible amendment of the pleading, the plaintiff could recover in this action.

Judgment affirmed.

MARCUS HILZHEIM *vs.* WESLEY DRANE.

No creditor but one who has a lien by judgment, or otherwise, can attack a sale and transfer of personal property as fraudulent; the right of the owner to sell is indisputable if no fraud mingle in the transaction; it is not necessary that the lien should exist at the time of sale; if it be subsequently acquired on a debt that existed at the time of sale, the latter may be attacked.

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Therefore in an action of replevin, it is not competent for the defendant to show himself a creditor by bill of exchange of the person who sold the thing sued for to the plaintiff, with the view of attacking that sale as fraudulent.

Where a creditor, whose claim has not yet been reduced to judgment, supposes his debtor has made a fraudulent disposition by transfer of his effects, he has no right to seize and hold the property thus transferred, by way of getting a security for his debt.

In error from the circuit court of Madison county; Hon. Robert C. Perry, judge.

This was an action of replevin, instituted in the circuit court of Madison county, by Marcus Hilzheim against Wesley Drane, under the act of 1842. The plea was *not guilty*.

The plaintiff proved on the trial that he had purchased the barouche and horses for which the action was brought, of one P. D. Hilzheim, that he had the property in possession under the purchase; that Wesley Drane had taken the barouche and horses from him, some time in 1842, subsequent to the purchase of P. D. Hilzheim. Drane, offered in evidence a bill of exchange, or draft, drawn by Thomas Latham, on, and accepted by P. D. Hilzheim, for $\$367\frac{50}{100}$, to the reading of which to the jury, the plaintiff's counsel excepted. The court overruled the objection, however, and permitted this bill of exchange to go to the jury.

It is not deemed necessary to set out more of the case; nor any of the instructions, in view of the opinion of this court.

The jury under the proof and instructions given below found for the defendant, and the plaintiff sued out this writ of error.

D. W. Adams, for plaintiff in error.

Besides the points made on the instructions, contended,

1. That this instruction of the bill of exchange could only tend to confuse the jury. The court should have rejected it. It is well established, "that the admission of improper testimony to the jury when objected to at the time, is irregular, and good grounds for reversal and a new trial. *Marquand* v. *Webb*, 16 Johns. 89; *Osgood* v. *Manhattan Co.*, 3 Cow. 612;

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2 Hall's Rep. 40; Graham on New Trials, 239–241; *Bohun* v. *Taylor*, 6 Cow. 313; *Foster* v. *Smith*, 10 Wend. 377.

2. That its introduction was illegal, unless the practice was to be introduced and sanctioned that one holding another's, or, as in this case, a third person's obligation for money, could seize on that other's property and satisfy himself; it could be justified on no other ground.

Per Curiam. This was an action of replevin for a carriage and pair of horses, in the circuit court of Madison county.

An exception was taken during the trial, to the admission of a bill of exchange in evidence, drawn on P. D. Hilzheim, and accepted by him. He had been the previous owner of the carriage and horses, and had sold them to Marcus Hilzheim. The testimony could only have been offered to show that the sale was fraudulent.

No creditor but one who has a lien by judgment or otherwise, can attack a sale and transfer of personal property as fraudulent. The right of the *owner* to sell is indisputable, if no fraud mingle in the transaction. It is not necessary that the lien should exist at the time of the sale, if it be subsequently acquired; the sale may be impeached for fraud, if the debt existed at the time of the transfer.

If there be no right in law and by suit to set aside the sale under the circumstances disclosed in this case, a party cannot take the remedy into his own hands, and seize and hold the property. Such a course would jeopardize the order and harmony of society.

For the improper admission of this testimony, the judgment will be reversed and new trial awarded.

From the inartificial manner in which the record is made out, it is not possible to say what charges were given, or what refused by the court. Indeed it states that some were both given and refused. In this state of things, we will not remark upon them, as there is really nothing intricate in the law on the subject.

Judgment reversed and new trial granted.

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THE COMMERCIAL BANK OF MANCHESTER *vs.* ADAMSON WATERS ET AL.

An equity of redemption in slaves is not the subject of execution; a levy, therefore, on such equity should be set aside.

A *supersedeas* is not the proper remedy for the violation, by a plaintiff in execution, of an injunction against the issuance of execution; the proper corrective is by an attachment against the party, or his attorney, for contempt.

IN error from the circuit court of Yazoo county; Hon. Robert C. Perry, judge.

The facts are sufficiently stated in the opinion of the court.

W. R. Miles, for plaintiff in error, cited 3 Jac. I., c. 8; 12 Car. II., c. 2; 16 and 17 Car. II., c. 8, § 3; H. & H. Dig. 538, § 39, p. 341, § 50; 4 S. & M. 484–490; Ib. 513–175.

R. S. Holt, for defendants in error, on the point that the equity of redemption could not be levied on, cited 4 S. & M. 163; and argued at length, that the *supersedeas* was properly retained, because of the injunction.

Mr. Justice CLAYTON delivered the opinion of the court.

A motion was made in the circuit court of Yazoo, to set aside a levy in this case upon an equity of redemption in slaves, and to supersede the execution, because the bank was at the time under a *quo warranto* and injunction, under the law of 1843. The court granted both motions.

It is settled, that an equity of redemption in personalty, is not the subject of execution sale; it was right, therefore, to set aside the levy. *Thornhill* v. *Gilmer*, 4 S. & M. 153.

But for the violation of the injunction, even if there were a valid injunction, the remedy was not by *supersedeas*. An attachment against the party, or the attorney, was the proper corrective. The question as to the validity of the injunction, would thus have been directly presented. For this reason, the judgment is reversed, and the *supersedeas* discharged.

Judgment reversed.

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Warner W. Wadlington *vs.* William R. Hill.

Covenants are to be construed as nearly as possible by the intention of the parties, to be gathered from the whole context, to be interpreted according to the reasonable sense of the words.

In contracts where either party may be compelled to part with his money or property without receiving the stipulated equivalent, the party seeking to enforce the contract must make his own part of the agreement precedent, and must allege either a performance or a tender and refusal.

H. bought a tract of land of W. for $10,500; paid five thousand dollars in cash, and entered into a covenant with W. to pay five thousand more in ten days, and five hundred on the first of January, thereafter, and W. covenanted "on the payment of the five thousand dollars last named" to execute good and sufficient titles for the land to H.; the latter being sued on the covenant for the $5,500 plead that W. had failed to have made to him a tender of a deed of conveyance of the lands: *Held*, on demurrer, that the plea was a good bar to the action.

In error from the circuit court of Madison county; Hon. John H. Rollins, judge.

Warner W. Wadlington brought his action of covenant against William R. Hill, on the following writing:

"Mississippi, Madison county.

"W. R. Hill and W. W. Wadlington have this day agreed on a contract for the sale, by the said Wadlington to said Hill, of the plantation and tract of land of Wadlington, in Madison county, near Demon, containing and warranted to contain six-eighths of land, being the same now occupied by said Wadlington, whereon his improvements are situated, at and for the sum of ten thousand five hundred dollars, current money of Mississippi currency, five thousand of which is paid down and received by said Wadlington, and the further sum of five thousand dollars is to be paid by said Hill in ten days, and the remaining sum of five hundred dollars is to be paid on the first of January, next, both said last mentioned sums to be paid in the like currency of the first. On the payment of the last men-

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tioned sum of five thousand dollars, the said Wadlington agrees to execute to said Hill good and sufficient titles for the plantation aforesaid, with sufficient warranty therein, which said land shall be free and clear from all incumbrances thereon."

Breaches are assigned in the non-payment of the $5,000 and $500.

The only question arises on the third plea, to which the plaintiff demurred. It is as follows:

"Because he says that the said plaintiff did not, after the said sum of $5,000 fell due, tender to the defendant good and sufficient titles to said plantation, with sufficient warranty, and did not request the said defendant to receive the same and pay plaintiff said sum of money, as the said plaintiff in his declaration alleges, and of this he puts himself upon the country," &c.

The plaintiff demurred to this plea; the circuit court overruled the demurrer, and gave judgment for the defendant. Wadlington sued out this writ of error.

D. Mayes, for plaintiff in error.

The tender of the deed, and demand of the money, not being a condition precedent, the issue tendered is immaterial. The traverse should be on a material allegation. *Bright* v. *Rowland*, 3 How. 415; Stephen on Plead. 241, 425.

W. R. Hill, in proper person,

Filed an elaborate argument in behalf of the plea, in which he cited and commented on the following authorities: Sug. on Vend. pt. 1, p. 293; *King* v. *Preston*, Doug. 689; Sug. on Vend. pt. 1, pp. 292–297; 1 Chit. Pl. 356; *Green* v. *Reynolds*, 2 John. Rep. 207; *Jones* v. *Gardner*, 10 Ib. 267; *Gazley* v. *Price*, 16 Ib. 267; *Parker* v. *Parmele*, 20 Ib. 130; *Robb* v. *Montgomery*, 20 Ib. 13; *Hudson* v. *Swift*, Ib. 23; *Hardin* v. *Keetsinger*, 17 Ib. 293; *Champion* v. *Rowley*, 13 Wend. 258; *Johnson* v. *Wygant*, 11 Ib. 48; *Hunt* v. *Livermore*, 5 Pick. 395; *Law* v. *House*, 3 Hill's S. C. Rep. 268; *Bank of Columbia* v. *Hagner*, 1 Pet. 455; 1 Saund. 320; *Cunningham* v. *Morrell*, 10 John. Rep. 203; *Terry* v. *Duntze*, 2 H. Black. 589; *Gibson* v. *Newman*,

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1 How. Miss. Rep. 341; *Pordage* v. *Cole*, 1 Saund. 319, n. 4; *Champion* v. *White*, 5 Cow. 509; *Mason* v. *Chambers*, 4 Litt. 253; *Saunders* v. *Ball*, 4 Bibb, 342; *Gardner* v. *Corson*, 15 Mass. 500; *Coleman* v. *Rowe*, 5 How. 460; 3 Serg. & Rawle, 228; 2 Rand. 473.

Mr. Justice THACHER delivered the opinion of the court.

This was an action of covenant, instituted in the Madison county circuit court. The articles of agreement, upon which the action was founded, covenanted that Wadlington should convey a tract of land to Hill, for the consideration of $10,500, of which sum, $5,000 was paid at the time of executing the contract, $5,000 was to have been paid ten days thereafter, and $500 was to be paid on the 1st day of January thereafter. It was further covenanted, that "on the payment of the last mentioned sum of $5,000," Wadlington was to execute to Hill good and sufficient titles for the tract of land in question. The question in the case, arises upon the sufficiency of a plea alleging a failure on the part of the plaintiff below, to have made a tender of a deed of conveyance of the tract of land. To such a plea, a demurrer, on the ground that the issue offered was immaterial, was overruled by the court.

The propriety of the decision of the court below, depends upon the solution of the inquiry whether the covenants in the articles of agreement are dependent or independent. In order to solve this question, the general rule should be carefully regarded, that covenants are to be construed, as near as possible, by the obvious intention of the parties, which must be gathered from the whole context of the instrument, interpreted according to the reasonable sense of the words. It will be observed that this is the case of a vendor seeking to make his vendee fulfil his engagement. In contracts where either party might be compelled to part with his money or his property, without receiving the stipulated equivalent, the latest and best action of the courts has been to hold that the party seeking to enforce the contract must make his own part of the agreement precedent, and allege either a performance or a tender, and

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refusal. *Bank of Columbia* v. *Hagner*, 1 Peters, 465; *Gardner* v. *King*, 2 Iredell, 297; *Stockton* v. *George*, 7 H. 172. The second covenant, in the articles of agreement now under consideration, is of the kind to which the foregoing rule applies.

Judgment affirmed.

The foregoing opinion was delivered at the January term 1846. D. Mayes, Esq., for the plaintiff in error, filed a petition for rehearing; the application was held up until the present term, (January, 1848,) when it was refused.

BENJAMIN D. HARRIS *vs.* WILLIAM M. GWIN.

The want of service or insufficient service of process, is cured by the appearance and plea of the party.

G. filed his bill, alleging, that a judgment at law had been obtained against him as indorser of a note, on which the maker and other parties were sued; that the service of process was not in accordance with the statute, and he had no knowledge of the pendency of the action; that two attorneys filed a plea for him, and not employed by him, and without his authority or knowledge, and that due notice of the protest was not served upon him; the bill did not set up any facts that if proved, would constitute a good defence at law; it did not aver that the attorney was irresponsible in damages; one of the attorneys who filed the plea, proved that the plea was filed either by himself or his co-attorney at the request of the principal for all the parties to the note; the deposition of the other attorney was not taken; *held*, that on this state of case the bill must be dismissed.

IN error from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

William M. Gwin filed his bill in the superior court of chancery, against Benjamin D. Harris, in which he charges, that it appears from the records of the circuit court of Hinds county, that a judgment at the November term, 1838, was rendered in favor of Harris, against Gwin, Benjamin E. Phillips and William Trahern, for six thousand four hundred and fifty dollars and

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thirty-one cents besides costs; this judgment was rendered on a note drawn by Benjamin W. Edwards for six thousand dollars, payable to, and indorsed by Benjamin E. Phillips, William Trahern, William H. Washington, George W. House, Gwin, and Charles W. Allen; that process in the suit was executed as to Gwin in this form: "Served by leaving a copy at William Gwin's dwelling-house, with James C. Moseley, the defendant not being at home, 4th May, 1838;" and he avers, that his wife, at the day of execution, was at his house, and that James C. Moseley was not a member of his family; and that he had no notice of the pendency of the suit, until informed by the sheriff of Hinds that he had an execution against him; that a plea was filed in said suit by Hutchinson and Kemp, as attorneys at law, for defendants; that Hutchinson and Kemp were not his general attorneys, and he did not employ them to defend or appear in this suit; that he *believes* he never had notice of the dishonor of the note sued on, having supposed it had been arranged in some way. He has examined the records of the notary who protested the note for non-payment, and cannot find evidence of notice to him, and he believes, on a trial, it will clearly appear, that he had no notice of the dishonor of the note. He prays that Harris be enjoined from proceeding on the judgment, and for general relief.

Harris's answers insist that the notice on the writ is good and constructive notice to Gwin; says he is advised that Gwin is bound by the appearance entered by Hutchinson and Kemp; and if he is injured, he must look to them. He believes Gwin had notice of the dishonor of said note. He saw the notary who protested the note, make out the notices — one for Gwin, addressed to him at Natchez — take them in his hand, and start to the post-office; he accompanied him until within a short distance of the post-office. The notary went on, and returned, saying he had deposited the notices in the office. He further states, that he has been informed by the judge who tried the cause, that, on the trial at law, the suit was tried on the merits, and proof made to charge Gwin. He pleads the trial at law in bar.

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James C. Moseley, a witness for Gwin, testifies that he does not recollect having received from the sheriff the copy of writ mentioned in the return; does not recollect having ever given notice to Gwin as to the service of the writ. He was not a member of the family of Gwin. Mrs. Gwin was at the residence of Gwin, in Natchez, on the 4th May, 1838.

Anderson Hutchinson, Esq., testifies that he was not, nor was Hutchinson and Kemp, the general attorney of Gwin. He was not, himself, nor does he believe Kemp was, employed by Gwin, to defend the suit on which judgment was rendered. He is confident that the plea was filed either by Kemp or himself, at the instance of Phillips, for him whose attorney he was, and for the other defendants; he never gave notice to Gwin of the pendency of the suit, and at the time the plea was filed, did not give notice to Harris that the plea was filed, without authority from Gwin.

The chancellor, on this state of pleading and proof, perpetuated the injunction.

Hughes, for plaintiff in error,

Insisted, that, on the facts disclosed, Gwin was liable on the judgment; he cited *Denton* v. *Noyes*, 6 John. Rep. 301-2; *Miller* v. *Ewing*, 8 S. & M. 421.

William and *William G. Thompson*, on the same side,

Cited 1 How. M. R. 17; 5 Ib. 525; 6 John. Rep. 34; 1 Salk. 86; 6 John. Rep. 296; 8 S. & M. 421.

W. Yerger, for defendant in error.

Mr. Justice THACHER delivered the opinion of the court.

Gwin filed his bill in the superior court of chancery. He charged therein, that Harris recovered a judgment against him, as the indorser of a promissory note, at the November term, 1838, of the Hinds county circuit court; that the original writ in this action was returned by the officer, served as to him, in this wise:—"Served, by leaving a copy at William M. Gwin's

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dwelling-house, with James C. Moseley, the defendant not being at home — 4th May, 1838;" that the plea of the general issue to the action was filed in his behalf by Hutchinson and Kemp, attorneys at law, without his authorization in any manner; that he was not informed of the pendency of the action, and that due legal notice of protest was not given to him, as indorser of the promissory note.

It was proved, by Hutchinson, that it was his confident impression that the plea for all the defendants was filed either by Kemp or himself, but at the request of the principal in the promissory note. The testimony of Kemp was not introduced.

The service of the process was probably insufficient, according to the requisitions of the statute; but this was cured and supplied by the appearance by plea. There was no attempt to show that the appearance was procured by fraud; but the testimony proves that it was made under the authority of one of the defendants, for all. The case is not fully made out by the complainant, as to the appearance. No attempt seems to have been tried to procure the evidence of Kemp.

The bill does not set up any facts that, if proved, would constitute for the complainant a good defence at law, and the record shows that there was a trial upon the merits, and a judgment thereon.

The bill does not set up that the attorneys are not responsible in damages.

The decree reversed, injunction dissolved, and bill dismissed.

SAMUEL K. MONTGOMERY ET AL. *vs.* THE AGRICULTURAL BANK.

Doty v. *Mitchell*, 9 S. & M. 435; cited and confirmed.

A married woman cannot part with her separate property in any other mode than in that which is pointed out by the deed of settlement; if that prescribe a different mode from the one established by the statute for the transfer of her estate, the mode designated in the deed of settlement *must be followed;* it will not be sufficient to pursue the statute, if it differ from the deed of settlement; it is the latter, in such case, and not the former, which confers the power.

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Where a marriage contract was entered into, by which the separate property of the wife and its proceeds were secured to her free from the control of her husband, and the mode of alienation of her property pointed out by the contract; and, afterwards, the husband bought other property with the proceeds of the wife's separate property, and took the title by mistake in his own name, but on discovery of his mistake, conveyed the property by deed of trust to a trustee, and, by the deed of trust, recited the facts and gave the same power and control over the property that she possessed before marriage; it was *held*, that the deed of trust must be construed in connection with the marriage settlement, in order to ascertain the wife's power over the property conveyed by it; she could not aliene or dispose of the property embraced in the deed of trust in any other mode than that designated in the marriage contract; and she might have enforced, had she been so disposed, a *legal title* in herself to the land embraced in the deed of trust, and held it as she held her other property under the marriage contract.

Where, therefore, under the marriage contract, the wife's power to aliene was declared to be by deed signed by her, attested by two witnesses in her presence, and by her request; and she, in conjunction with her husband and the trustee in this subsequent deed of trust, executed a mortgage on the property embraced in the deed of trust, to secure a debt of her husband; and the mortgage was executed and acknowledged only in the ordinary mode; it was *held*, that it did not bind the wife's property embraced in the deed of trust, and could not be enforced against it.

Where the first clause in a deed of marriage settlement gave the wife the power of disposition of her separate estate, and the second clause pointed out the *mode* of disposition; it was *held*, that the two clauses were not inconsistent with each other.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

The Agricultural Bank states, in its bill, that Samuel K. Montgomery, and Mary Ann Montgomery his wife, and Alexander K. Montgomery, on the 3d of May, 1840, mortgaged certain land and slaves to complainants, to secure the payment of three promissory notes of Samuel K. Montgomery, dated 20th May, 1840, and due over two and three years thereafter respectively, each for the sum of twenty-six hundred and eighteen dollars. That the notes are still held by the bank, and remain unpaid. The bill prays a foreclosure and sale. The mortgage was exhibited with the bill.

The defendants demurred to the bill, and the chancellor delivered, upon the demurrer, the following opinion:

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This is a bill in the usual form for a foreclosure of a mortgage on some personal and real estate situated in the county of Adams. It appears, from the recitals of the mortgage, that it embraces the separate estate of Mary Ann Montgomery, and that it was made to secure a debt due from her husband to the Agricultural Bank. The husband, wife and trustee of the estate have all united in the mortgage. It is insisted, by the counsel for the demurrer, that a court of equity will not enforce a mortgage, made by a *feme covert* upon her separate estate to secure the debts of her husband, and especially if the bill does not negative the idea of coercion, and undue influence in the execution of the mortgage. No legal proposition has been more frequently, and none more thoroughly canvassed, than the rights and power of a *feme covert* over her separate estate. Without attempting to collate the numerous decisions upon the point, I think it may be confidently stated, that the weight of authority, both English and American, places a *feme covert* in regard to her separate estate, upon the same footing with a *feme sole*, and establishes her right to dispose of it for any legal purpose, and in any mode which is not expressly prohibited by the instrument creating the estate. This unrestricted right of disposition necessarily results from her separate right of property. She is as to that estate *sui juris*, and may make any disposition of it she chooses, which does not directly violate the terms of the instrument under which she acquired it. She may give it away, sell it, or mortgage it for the debts of her husband; and any such disposition will be sanctioned and enforced in a court of equity, unless it should be made to appear that it was effected through fraud or undue influence. She may do all this even without the assent and concurrence of her trustee, unless his co-operation is expressly required by the provisions of the deed. These principles are established by the following authorities, viz.: *Allen* v. *Papworth*, 1 Ves. sen. 163; *Standford* v. *Marshall*, 2 Atk. R. 68; *Grigsby* v. *Cox*, 1 Ves. sen. 517, 518; *Wagstaff* v. *Smith*, 9 Ves. 520; *Sturgis* v. *Corp*, 13 Ves. 189; *Damarest* v. *Wynkoop*, 3 John. Ch. R. 129; *Vizonneau* v. *Pegram*, 2 Leigh's Rep. 183; *Jacques* v. *Methodist Episcopal Church*, 17 John. R. 548.

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I am of opinion, then, that it was perfectly competent, upon general principles, for Mrs. Montgomery to mortgage her separate estate for the debts of her husband, and that the mortgage should be enforced in equity, unless it was unfairly or fraudulently obtained; and the court will presume in favor of the *bona fides* of the transaction, until some suspicion of unfairness is thrown upon it, as a ground of defence. It is not necessary that the complainant should allege that it was fairly obtained; if it was otherwise, it devolves upon the defendants to show it by pleading and proof.

The demurrer must be overruled, and the defendants required to answer within ten days.

The defendants afterwards answered.

Mary Ann Montgomery's answer states, that on the 20th of August, 1832, she being a widow, made a marriage contract with her present husband, Samuel K. Montgomery, in which it was stipulated that her property should remain to her free from the control of her husband; and that she should have power, notwithstanding coverture, by will or by any instrument in writing, signed by her and attested by two witnesses, to dispose of said estate.

That S. K. Montgomery, after the marriage, purchased with her funds the land conveyed by the mortgage, which land was conveyed to him through ignorance or mistake. That when the legal effect of this mistake was ascertained, her husband being then nearly unembarrassed, and able to pay all his debts, executed a conveyance in favor of Alexander Montgomery, in trust for her separate use of this land, and divers slaves and choses in action; and thereby gave her such power and control over the same, as she possessed before marriage.

This deed of trust enumerates various choses in action, which were transferred by it, the proceeds of sale of her separate property; some of which, the answer states, her husband, with her consent, has used; the rest she has been unable to collect, and has little or nothing left except the property mentioned in the mortgage. When she entered into said mortgage, she felt able and willing to discharge the debt, and would have done so but for

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the ruinous losses she has sustained; and only interposes these obstacles to obtain time to recover the money due her, when she will pay the debt.

She states she is advised that by this deed and the marriage contract, she had a use in the land and slaves mortgaged, for life, with contingent remainder in fee, with power to dispose of the same by will, or writing attested by two witnesses, and not otherwise; and that she had no estate or interest in the land or slaves subject to be mortgaged, in the mode in which mortgage was executed. And that neither her husband nor Alexander Montgomery had such interest or powers over the land and slaves, as authorized them to mortgage the same, and the mortgage was therefore void.

Samuel K. Montgomery admits the mortgage, and that the debt intended to be thereby secured was *bona fide*, and his own debt; that when he gave the mortgage, he informed the complainants fully of the condition of the title, and offered to exhibit the deeds; that he knew he had no authority to mortgage, but believed the trustee had.

Alexander Montgomery's answer states that he had not, nor has he now, any interest in the land and slaves contained in the mortgage; that all his rights and powers appear by the deed of trust. He joined in the mortgage at the request of Samuel K. Montgomery, without reflecting that he had no power to charge the estate for his benefit. He is now satisfied he had no such power, and that the act is a mere nullity, and submits to the court whether the mortgage derives any validity from being executed by him.

No proof was taken on either side. The marriage contract and deed of trust were filed with Mrs. Montgomery's answer. The former was as follows, viz.:

"This indenture made and entered into this the 20th day of August, 1832, between Samuel K. Montgomery, of the county of Claiborne, and state of Mississippi, of the one part, and Mrs. Mary Ann Alexander, of the parish of Concordia, and state of Louisiana, of the other part; *witnesseth*, that whereas a marriage is shortly intended to be solemnized between the parties

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above-mentioned, in the county of Woodford and state of Kentucky, and in consideration thereof it is agreed between them, that the whole of the property, real, personal or mixed, possessed by and belonging to, or in anywise accrued or accruing to the said Mary Ann Alexander, before the said marriage, shall remain to her free from the control of the said intended husband after the said marriage, and in all respects shall be under the control and power of the said intended wife, to sell, devise and dispose of at her will and pleasure, notwithstanding the said coverture.

"Now this indenture doth testify, that the whole of the property in lands, slaves, goods and chattels, real, personal and mixed, of the said intended wife, and to her of right belonging, before and at the sealing and delivery of these presents, shall be and forever remain to her own sole use and behoof, and under her entire control and power, to sell, dispose of, or devise in any way she may deem proper, free from all let, molestation, or hindrance of the said intended husband; and that the said intended husband doth hereby, and by these presents release and convey to the said intended wife, all interest, right, claim or control which he might acquire of, in and to the property aforesaid, either in law or equity, in consequence of the said intended marriage; and that the said intended wife shall have power, notwithstanding her coverture by last will and testament, or by any instrument in the nature of a last will and testament, or by an instrument in writing signed by her, and attested by two witnesses in her presence, and by her request, to dispose of any or all of the said estate, lands, tenements, slaves, increase of slaves, goods, chattels, or any part or parcel thereof, in fee or for any shorter or lesser estate, as fully as if she were a *feme sole*. And this indenture further witnesseth, that the said Montgomery agrees to, and doth hereby invest with and convey to the said intended wife, a community and an equal interest in all the property, real, personal or mixed, held or acquired by the said Montgomery during the lives of the parties thereto; and in the event that the said intended wife should survive the said Montgomery, then that the whole of the property, real,

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personal and mixed, owned by the said Montgomery at the time of his death, shall descend and belong to the said intended wife, unless there should be issue living by the said marriage, at the time of the death of the said Montgomery, in which event the property last mentioned is to be equally divided between said issue and said intended wife. In witness whereof," &c.

The deed of trust, dated the 20th of March, 1837, was between Samuel K. Montgomery, of the first part, Alexander Montgomery, of the second part, and Mary Ann Montgomery, of the third part, and recited as follows, viz.: "Whereas, by a certain deed of marriage settlement, made and executed on the 20th day of August, A. D. 1832, between said Samuel K. Montgomery and Mary Ann Alexander, now Mary Ann Montgomery, previous to and in contemplation of the marriage, shortly afterwards consummated and solemnized between them, &c., it was stipulated and agreed upon. [Here the marriage settlement was recited.] And whereas, doubts, fears and misapprehensions may exist or arise in reference to the rights of said Mary Ann, &c. (Here the deed of trust recites doubts and difficulties that might arise as to the construction of the rights of Mrs. Montgomery, on a sale by her; and her right to acquire and hold property in her own name, the change of residence of the parties and other causes; and recites that, whereas it was possible that difficulties growing out of these and other matters, might cause the title to be wrested from the control contemplated by the marriage settlement.) "And whereas, the said Samuel K. and Mary Ann Montgomery are desirous to strengthen, confirm and carry out and perfect the provisions and conditions contained in the said marriage contract, and in the several deeds, conveyances, bills of sale, and title papers predicated thereon, agreeably to the original intention and wish of the parties at the time, and as herein more fully explained."

The deed proceeds to state the duty and obligation incumbent on Samuel K. Montgomery, in good faith and morals and honor to secure the property of his wife to her, and a home to her, and to place her above want; and that the property about to be conveyed was in her possession, and the title certainly either in her or him.

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"Now, therefore," (proceeds the deed) "for the reasons aforesaid, and considering the uncertainty of life, the mutability of all things, and to definitely designate, identify, and establish the rights, claims, dues and demands of the said Mary Ann Montgomery, under said coverture and marriage contract, and accrued and accruing to her use otherwise, the said Samuel K. Montgomery, with the knowledge and assent of the said Mary Ann, and for the further consideration of one dollar, &c. doth hereby give, grant, bargain, sell, convey, assign, transfer, relinquish, set over and confirm to the said Alexander K. Montgomery, his heirs, &c. in trust, for the only separate use, benefit, advantage and behoof of the said Mary Ann Montgomery, all his right, &c." (Here the deed proceeds to describe the property conveyed, consisting of a legacy of five thousand to the wife, various notes, choses in action, real and personal property, including that conveyed in the mortgage to complainants, and which is described in the deed as having been "purchased with the means of said Mary Ann.) "To have and to hold all the property herein described to the said Alexander Montgomery, his executors and administrators in trust, as aforesaid, together with the reversions, remainders, rents, issues, income and profits, upon these trusts following:" (The deed here proceeds to enumerate the trusts, the substance of which will be briefly stated; 1st, That Mrs. Montgomery should retain possession; 2d, That the survivor of husband and wife should become seized of, inherit, derive, and acquire, absolutely in the survivor's own right, all the right, title, &c. of the deceased, to all the property, whether contained in the marriage settlement or this deed; 3d, That the trustees should faithfully discharge his duties, and 4th, Receive a reasonable compensation; 5th, Might resign on certain terms; 6th, On request of the parties be superseded; 7th, The provisions of the deed to cease on the death of either party, husband or wife; 8th, That the construction of the deed was to be most favorable to Mrs. Montgomery and against the grantor. The deed was witnessed by two witnesses, signed by all the parties, and duly acknowledged.

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The chancellor, when the case was submitted to him, upon this state of pleading and proof, delivered this brief opinion:

"I have heretofore decided on demurrer in this case, that it was competent for a *feme covert* to bind her separate property for the debts of the husband. It is now objected, that her conveyance is not valid, because not in accordance with the forms and solemnities prescribed by the articles of marriage settlement. To this there are several answers. 1. That the first part of the deed gives a general and unrestricted power of disposition, the latter part, which attempts to restrict her right of disposition to a particular form is inconsistent with and repugnant to the prior clause on the subject, and is, therefore, upon familiar principles of construction, overruled.

"2. But even where a particular mode of disposition is pointed out, yet she may dispose of it in any other mode, unless there be negative words restricting her to the very mode pointed out in the deed. See *Jacques* v. *The Meth. Epis. Church*, 17 John. 548; 2 Gill & John. 1, where, upon elaborate examination of the English authorities, this proposition is laid down as the result.

"3. It is at most but a defective execution of the power in mere matter of form, and nothing is clearer upon authority than that a court of equity will aid a defective execution of a power, that is, hold it to be good, where such execution was made upon a valuable consideration, as is the case here.

"I think the complainant is entitled to a decree of foreclosure of the mortgage."

The decree to foreclose was accordingly entered; and the defendants appealed.

Montgomery and *Boyd*, for appellants, cited *Williams* v. *Coussmaker*, 12 Ves. 136; 1 Wils. 88; *Battersbee* v. *Farrington*, 1 Swanston, 106; 1 Story's Eq. 365, 366; Clancy's Rights of Mar. Wom. 545; 1 Sim. & Stu. 363; 1 Eng. Con. Ch. Rep. 186; 2 Jac. & Walk. 456; 4 Bro. Ch. Cas. 483; Turner's Dig. 76, § 11; Toulman's Dig. 244; How. & Hutch. 247, § 19; Ib. 86, §§ 2, 3; 3 Paige Ch. Rep. 117; 1 Ves. Sr. 299; Sugden on

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Pow. 113–120; Ib. 209, 210; 7 Taunt. 360; 17 Ves. 454; 1 Eng. Com. Law Rep. 133; *Jaques* v. *Meth. Epis. Church*, 3 John. Ch. R. 77; *Ewing* v. *Smith*, 3 Dessaus. R. 417; *Jackson* v. *Hobhouse*, 2 Meriv. R. 483; *Morgan* v. *Elam*, 4 Yerg. R. 375; Kent's Com. (ed. 1844) 164–8; *Lancaster* v. *Dolan*, 1 Rawle's R. 231; *Doty* v. *Mitchell*, 9 S. & M. 435; *Williams* v. *Claiborne*, 1 S. & M. Ch. Rep. 355; 1 Story Eq. 181–193; 2 Story Eq. 607, 608, 617–624; *James et ux.* v. *Fisk*, 9 S. & M. 144; *Thompson* v. *Blair*, 3 Mer. 583; 15 John. R. 555; 2 C. C. E. 326; 2 Powell on Mort. 561–2; 10 John. Rep. 374; 1 John. Ch. R. 299; Sugden on Vend. 544–5; 7 S. & M. 488.

Eustis, for appellees, cited the opinions of the chancellor, and the authorites cited; Rev. Code, p. 457; Sugden on Pow. 117; *Hele* v. *Bond*, Ib. App. 5; *Doe* v. *Jones*, 10 Barn. & Cress. 459; 2 Sug. on Pow. 33.

Mr. Justice THACHER delivered the opinion of the court.

The bill of complaint filed in the superior court of chancery avers that the defendants, on the 3d day of May, 1840, executed a mortgage to complainant to secure the payment of three promissory notes of the defendant, Samuel K. Montgomery. The answer of the defendant, Mrs. Montgomery, avers that on the 20th day of August, 1832, she, being then a widow, made a marriage contract with Samuel K. Montgomery, now her husband, by which her property was stipulated to remain to her, free from the control of her husband. It further avers that the husband purchased the land conveyed in the mortgage with the funds of the wife, and by mistake took a conveyance to himself as agent of his wife; but upon discovery of this error, the husband made a conveyance of said land to Alexander Montgomery in trust, for the separate use of the wife, together with divers slaves, and other property, and by the conveyance giving to the wife such power and control over the property as she possessed before marriage. It further avers, that at the time the conveyance in trust was made, the husband was comparatively but little embarrassed in his circumstances.

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This case will be found not to differ in the principles upon which it must turn, from that of *Minerva Doty et al.* v. *William S. Mitchell*, decided at the present term of this court. 9 S. & M. 435.

The land, which was the subject of the mortgage, was purchased with the proceeds of the separate property of the wife. The proceeds of the separate property were secured to the wife by the marriage settlement. The deed of trust, which was designed by the husband to correct the mistake in taking the conveyance of the land in his own name as agent for the wife, must be considered in connection with the marriage settlement, to arrive at the wife's power over it. The deed of trust refers to the marriage settlement as one of the moving causes of its execution. It was established to fix in Mrs. Montgomery more firmly the equity which she already possessed in the land, from its purchase with funds derived from her separate estate. In fact, she was entitled to receive even the legal title, and possibly might still enforce this right. At all events, under the decision before referred to, she could not divest herself of her interest in the land, such as it was, except in the mode pointed out by the settlement.

The marriage settlement contains, first, a power of disposing of the property so secured; and, secondly, the manner in which that power shall be executed. The second clause does not restrict the right of disposition, but simply points out the mode in which the right shall be exercised. The two clauses are compatible and not inconsistent with each other.

The form of disposal required by the settlement is by an instrument in writing, signed by the wife and attested by two witnesses in her presence, and by her request. Upon this subject, it is sufficient to add to what has already been said in the case of *Minerva Doty et al.* v. *William S. Mitchell*, that the wife derives her power to dispose of the property, not from the law or statute, but from the settlement. Although, under the statute, an acknowledgment of a conveyance is equivalent to the attestation and proof by two witnesses, and even by one witness, by the decision of this court, such is not the law gov-

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erning the disposal of the separate property of a *feme covert*. She derives her power from the exception she herself makes by the settlement, and she must pursue the mode she has appointed for the exercise of the power.

The decree must be reversed, the demurrer allowed, and the bill dismissed, but without prejudice to any rights that Samuel K. Montgomery may possess by virtue of survivorship of his wife.

Counsel for the appellees applied for a re-argument; but the application was denied.

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JOHN D. FREEMAN *vs.* GEORGE WINCHESTER.

Whether a receiver appointed by the chancellor, in a suit pending before him, has the right in any case, unless he be specially empowered to do so by the order appointing him, to bring a suit *in his own name*, touching the subject of his receivership; — *Quære*.

If the chancellor have the power to confer such authority upon a receiver, it can only be exercised by the receiver according to the appropriate remedy; the chancellor cannot convert remedies from legal to equitable. The receiver must sue in the court having jurisdiction of the subject-matter of the suit.

The legislature, by a law passed in the year 1844, provided for placing the Mississippi Railroad Company in liquidation, for the benefit of its creditors; the state filed a bill under the act, and F. was appointed a receiver, with power to take possession of the notes and other evidences of debt, and to sue for and collect all moneys due the company. F., as receiver, filed a bill in his own name, to recover of W. the amount he had subscribed to the capital stock of the company. *Held*, on demurrer to the bill, that the liability of W. to the company, for his unpaid for stock, was purely a legal one; and, that even if F. could maintain any action therefor, in his own name, it would be an action at law, and not in equity; and, that the demurrer must be allowed.

Where a charter of a company provides for the forfeiture and sale of stock, on failure of the stockholder to pay, such remedy is merely cumulative. The company may also sue the delinquent stockholder at law.

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In error from the decree of the district chancery court at Natchez; Hon. James M. Smiley, vice-chancellor.

On the 20th day of October, 1846, John D. Freeman filed his bill, in which he states, that on the 21st day of July, 1845, a bill was filed in the superior court of chancery, by the attorney of the state, on behalf of the state, and all other creditors of the Mississippi railroad company, against that company; stating that it was totally insolvent, and unable to construct the railroad, or pay its just debts. That bill contained prayers for an injunction, and for the appointment of a receiver to collect the assets of the company, and hold the same subject to the order of the court. An order was granted, restraining the company and all its agents from disposing of and meddling with the effects of the company; and complainant was appointed a receiver in the cause, "with full power to take into his possession the bills, bonds, notes, and other evidences of debt, belonging to said company, with power to sue for and collect all moneys due on the same.

The bill further states, that in 1837, George Winchester subscribed for twenty shares of stock, of one hundred dollars each, in the company. It also proceeds to state the periods at which the subscription was payable, and the amount yet due; and prays for a discovery of the amount due on account, and that he may be decreed to pay the complainant the amount found due by him upon such subscription to stock.

Winchester demurred to the bill; the vice-chancellor sustained the demurrer; and Freeman prosecuted this writ of error.

John D. Freeman, in proper person,

Argued at length in behalf of the bill, and cited the following authorities: Stat. of 1844, p. 138; 3 Mason, 308; 16 Mass, 9, 15; *King* v. *Elliott*, 5. S. & M. 428; 1 Barbour's Ch. Prac. tit. *Receivers*, 658–663; 2 Sto. Eq. 134–135; 6 Hill, 269; 1 Peters, 55; 14 Wend. 24; Laws of 1836, pp. 175–6; Laws of Miss. 702, § 1; Ib. 830–1, § 3; Ang. & Ames, 420, § 5, *et seq.*

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George S. Yerger, for defendant in error,

Cited Sto. Eq. Pl. sec. 508; sec. 260, 261; 1 Smith's Ch. Prac. 638; 2 Atk. Rep. 213; 1 John. Ch. Rep. 60; *Smiley* v. *Bell*, M. & Yerg. Rep. 378; Ang. & Ames on Corp. 411-412; Ang. on Lim. 420; Sto. Eq. Pl. § 484; *Dunlap* v. *Gibbs*, 4 Yerg. Rep. 94; *Foster* v. *Hogsden*, 19 Vesey, 180; *Hoare* v. *Peck*, 6 Simons Rep. 51; *Cuthbert* v. *Cressy*, 4 Bligh's Rep. 125; *Tyson* v. *Pole*, 3 Young & Collyer, 266; *Humbert* v. *Trinity Church*, 7 Paige, 195; *Vanhook* v. *Whitlock*, 7 Ib. 373.

J. T. McMurran, on the same side,

Cited 3 Am. Eq. Dig. 555, §§ 18, 19, 20; 1 Smith's Ch. Prac. 638; 1 John. Ch. Rep. 60; Stat. of 1836, p. 173, *et seq.*, § 4; 1 Bro. Ch. Rep. 27; 1 Met. & Perk. U. S. Dig. 556, §§ 74, 75, 76; 2 Verm. Rep. 373; 2 Bibb, 575; 14 John. Rep. 238; Ang. & Ames on Corp. 409-423, chap. 15.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

A bill was filed in the superior court of chancery, against the Mississippi Railroad Company, under the act of 1844, which act provided for placing said company in liquidation for the benefit of creditors. Under a prayer in the original bill, the complainant was appointed a receiver, with power to take possession of the notes, and other evidences of debt, and to sue for and collect all moneys due the company. By virtue of that appointment, this bill was filed in the district chancery court, to recover of the respondent the amount he had subscribed to the capital stock of the company. The respondent demurred, and the demurrer was allowed.

The liability of the respondent on his subscription, as it originally existed, was purely legal in its character. He was liable to be sued at law, by the corporation, for the amount he had subscribed, although the charter may have contained a clause providing for a forfeiture of the stock, on failure to pay. The remedy by forfeiture and sale is but cumulative. Ang. & Ames on Corp. 293, 310-11.

The question then is, can the complainant sue in his own

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name, in equity, to recover a debt which, as between the original parties, was recoverable only at law? The appointment of a receiver, in this case, was not made under any provision in the statute under which the proceeding was instituted against the bank. In case of a voluntary surrender of the franchise, the act authorizes the governor to appoint two commissioners to wind up the affairs of the bank, one of whom should be nominated by the stockholders. But, if a voluntary surrender was not made, then the act required the attorney-general to proceed, by bill in chancery, to have the charter vacated, but two commissioners were still to be appointed by the governor. The commissioners were empowered to receive all the assets and property of the bank, and to collect the debts by suit or otherwise. If the charter has been declared forfeited, the commissioners are the proper persons to collect the debts, and not a receiver appointed pending litigation. But whether a forfeiture has been declared, does not appear. But if the receiver is still invested with power, he is not authorized to sue in chancery, for the collection of a purely legal demand. Indeed, no case has been found, in which a receiver has been permitted to sue, except at law, in the action of ejectment, on leave granted by the court for that purpose. 2 Maddock's Ch. 243; 1 Smith's Ch. Prac. 638. He is but an officer of the court, appointed to hold a fund pending litigation, or infancy. But if he can sue at all, it must be in the name of the party having the legal right; and the authority to sue does not convert that into an equitable right which was before purely legal, or he could not bring ejectment. If he is to be regarded as the assignee, he should sue at law, of course, on mere legal demands. And if he is considered as trustee, it is the same thing, for a trustee may sue at law.

But, does the receiver derive power to sue, in this instance, from the order of his appointment? It is alleged in the bill, that he is authorized to sue for and collect all moneys due the company. Admitting that this order conferred the power to sue, it only gives the power to be exercised according to the appropriate remedy. The chancellor could not convert remedies

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from legal to equitable. If he could confer the power to sue, he could confer it to be exercised as well at law as in equity.

Decree affirmed.

WILLIAM H. HARALSON *vs.* NEVIL HOLCOMBE ET AL.

A motion to erase a credit on an execution, made more than five years after the indorsement of the credit and the return of the execution, cannot prevail; the plaintiff in the execution is presumed to have known of the return, and from the lapse of time without objecting to it, he will be presumed to have acquiesced in it.

It seems that if urged in due time, it would be good ground to set aside the entry of satisfaction on an execution, that the money was paid after the return day of the execution; yet such payment is capable of confirmation, and long acquiescence must have the same effect.

IN error from the circuit court of Rankin county; Hon. John H. Rollins, judge.

At the June term of the Rankin circuit court, 1843, William H. Haralson moved the court to erase a credit of $800 entered by the sheriff of Rankin county, on the 4th day of May, 1838, upon an execution in his favor against Nevil Holcombe and others, which issued from the said circuit court on the 20th day of January, 1838, and was returnable on the 3d Monday of April, 1838.

The circuit court, on hearing, overruled the motion, and the plaintiff excepted, and in his bill of exceptions is contained the evidence on the trial of the motion.

The plaintiff read to the court the *fieri facias*, on which the credit was indorsed, returnable on the 3d Monday of April, 1838, and a forthcoming bond taken from the defendants in execution, which was forfeited on the return day thereof; and also read the return of the sheriff, giving the credit in the following words and figures, viz. "Received eight hundred dollars on account of this *fi. fa.*, May 4th, 1838. W. P. Coleman, sheriff;" — and the following further return: "Levied on five

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negroes, to wit, Henry, John, Ann, Mary and Elvira, and bond taken with H. Holcombe and Daniel D. Holcombe, security, — W. P. Coleman, sheriff, by W. R. Parker, D. S."

The defendants read in evidence an execution on the forfeited bond, returnable on the 3d Monday of October, 1838, which issued on the 15th June, 1838, with the following memorandum indorsed on the same: "This execution is entitled to a credit of eight hundred dollars, paid 4th May, 1838, as per indorsement of the sheriff on the first *fi. fa.* issued — Teste, Hugh L. French, clerk." The defendants "also read a receipt by Rives and Hughes, attorneys of record, in the following words, to wit: "Received on this execution one hundred and thirty-three dollars forty-eight cents. — October 18th, 1838. — Rives and Hughes, for plaintiff." This receipt was entered *on the sheriff's docket*, where said execution was docketed, immediately under the words, "Received $800 on account of this *fi. fa.*, 4th May, 1838," which memorandum was not signed by any person; — and this was all the evidence on the trial of the motion.

The plaintiff also moved the court to allow the sheriff to amend his return on the execution, on which the credit was indorsed, according to the truth of the case. This motion was disallowed.

The plaintiff sued out this writ of error.

Harper and *Swann*, for plaintiff in error.

The receipt of the eight hundred dollars by the sheriff of Rankin county, on the 4th May, 1838, indorsed on the *fi. fa.*, returnable to the 3d Monday of April previous, which was satisfied by the forfeiture of a forthcoming bond to that term, was clearly unauthorized, and void as to the plaintiff. Without an operative execution in his hands at the time, no receipt by the sheriff could bind the plaintiff; the record shows that on the 4th May, 1838, no such execution was in the officer's hands. *Planters Bank* v. *Scott*, 5 How. 246; *McFarland* v. *Wilson*, 2 S. &. M. 269.

C. R. Clifton, for defendant in error.

1. The lapse of five years from the entry of the credit to the

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motion to erase it, is conclusive against the motion. *Prewett* v. *Standifer*, 8 S. & M. 493.

2. The reception of part of the money by the attorney of the plaintiff, was a ratification of the whole payment.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a motion to erase a credit from an execution, made more than five years after the indorsement of the credit, and the return of the execution. A new execution was issued for the balance due on the judgment, which was returned satisfied twelve months after the return now sought to be expunged.

In the case of *Prewitt* v. *Standifer*, 8 S. & M. 493, it was held, that after an acquiescence of six years, unless the delay was satisfactorily explained, the plaintiff would be considered as bound by a return of satisfaction, upon an execution. It was said the plaintiff must be presumed to have known of the return, and he ought at once to have disclaimed the act, if he did not intend to be bound by it.

In this case a similar presumption would arise. The delay has been so great, that if the payment were set aside, the defendant in the execution would probably be barred of an action on the official bond of the sheriff against his sureties for the amount so paid to him. Five years form the limitation to such actions. H. & H. 570, § 97.

The ground on which the motion was made, appears to have been, that the money was paid after the return day of the execution. That would have been good cause, if application had been made in due time. But such an act is capable of confirmation, and long acquiescence must have the same effect. See *Anketell* v. *Torrey*, 7 S. & M. 474; 2 How. S. C. R. 258.

If leave had been granted to the sheriff, at the time the motion was tried to amend his return, such amendment could not have explained away the acquiescence. It must have been confined to the facts which transpired anterior to the return. This makes it unnecessary to decide upon the propriety of refusing the application for leave to amend.

Judgment affirmed.

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MARY SMITH *vs.* JOHN DOE ex dem. WILLIAM F. WALKER.

A levy of an execution on *real estate* does not amount to even *prima facie* satisfaction of the execution.

But a levy on personalty is a *prima facie* satisfaction; yet it may be shown not to have been an absolute satisfaction.

Therefore, in ejectment, where the lessor of the plaintiff claimed under a sheriff's deed, and the defendant showed that a prior execution on the judgment under which the lessor bought had been levied on personal and real estate sufficient to satisfy it, it was *held* competent for the lessor to show that this previous execution had been levied with others against the same defendant, and this levy disposed of by a sale that did not yield sufficient to pay off the other executions levied at the same time, and which were on older judgments than the one under which the lessor bought.

If, in an action of ejectment, it be proved that the *tenant* of the defendant is in possession of the premises in controversy, it will be sufficient; proof of the tenant's possession is proof of the landlord's.

IN error from the circuit court of Madison county; Hon. Morgan L. Fitch, judge.

The facts are sufficiently stated in the opinion of the court.

Van Vacter, for plaintiff in error,

On the point, that the execution under which the sale took place, was improperly admitted in evidence because of the previous levy, cited *Arnold* v. *Fuller*, 1 Ham. 458; 1 Pirtle's Dig. 406, § 1; 3 McCord, 429; *Kershaw* v. *Merchants Bank of New York*, 7 How. (Mi.) 386; 4 Man. 402; 2 Pick. 586; 6 Wend. 562.

On the point, that there was no proof of defendant's possession, cited *Pickett* v. *Doe*, 5 S. & M. 470; *Newman* v. *Foster's heirs*, 3 How. (Mi.) 383; *Wallis* v. *Doe*, 2 S. & M. 220; *West* v. *Talman*, 4 Wash. C. C. R. 200.

A. H. Handy, for defendant in error.

In reply to first point, contended, 1. That the levy had been

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disposed of by the subsequent sale; 2. Even if it had not, an innocent purchaser under a subsequent execution would hold the property. *Bibb* v. *Jones*, 7 How. (Mi.) R. 397.

On the second point, he contended, that the tenant's possession was that of the landlord, and cited 2 S. & M. 225.

Mr. Justice CLAYTON delivered the opinion of the court.

An execution, issued on a judgment of C. Marsh & Co. against Benjamin Williams and John S. Gooch, which was levied on real and personal estate, sufficient to have satisfied it, on the first of September, 1837. Some years afterwards, another execution issued on the judgment, which was levied on the land in controversy, which was sold to the lessor of the plaintiff, and a sheriff's deed made therefor. This suit is brought to recover the possession. To defeat the recovery, the defendant proved the levy made in September, 1837, and relied on it as satisfaction of the execution. To rebut this, the plaintiff gave, in evidence, an order of the court made at the May term, 1842, directing satisfaction to be entered of several judgments, the executions on which, were returnable to the October term, 1837, of the court, the same having been fully paid by the proceeds of the sale of the property levied on by the sheriff, on the first of September, 1837. These judgments, on which satisfaction was so directed to be entered, were older than the judgment under which this sale took place, and their amount appears to have been much greater than the sum produced by the sale of the personal property contained in the levy.

It is settled, that a levy on personal property is only *prima facie* evidence of satisfaction of an execution. *Banks* v. *Evans*, decided at this term. (Ante, 35.) A levy on real estate does not amount to satisfaction at all, because there is no change of property or of possession until sale. It was competent to the plaintiff to show, that the presumption of satisfaction was repelled, and that there had been no actual satisfaction.

The evidence was proper to go to the jury, and the conclusion drawn from it was well warranted. There is nothing to justify us in setting aside their verdict.

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It is said there was no proof of the possession of the defendant at the time of the suit brought. The evidence was, that her tenant held the possession for her. In *Wallis* v. *Doe* on dem. *of Smith's heirs*, 2 S. & M. 220, it is decided, that proof of possession by the tenant, is proof of the landlord's possession, and is sufficient. See, also, 5 S. & M. 470.

The judgment is affirmed.

ADLAI BEARD, Administrator of John B. Griffin, deceased, *vs.* DANIEL GRIFFIN.

In every action at law, the plaintiff must show a legal title to the instrument sued on; and if he have none, he cannot recover on the instrument, although the defendant may have promised him to pay it.

B. executed his bond payable to A., who died the holder of the bond; on his death, C., who had been book-keeper of A., sold the bond without indorsement to T., to whom, while holder, B. promised, in the presence of G., to pay it; upon which, G. obtained it from T., and brought suit against B. upon it, in one count of the declaration alleging this promise by B.; the latter plead want of title in G. to the bond: *Held*, that the facts sustained the plea the legal title was in the administrator of A., who alone could sue on the bond; the promise of B. was a waiver of defence to the bond in the hands of a legal holder; but did not dispense with proof of title in the holder.

IN error from the circuit court of Tippah county; Hon. Hugh R. Miller, judge.

Daniel Griffin, in his declaration, describing himself *as assignee of S. S. Tyer*, filed his declaration in debt to the March term, 1846, of the Tippah circuit court, against John B. Griffin. The declaration in substance alleges, that John B. Griffin, on the 14th of February, 1840, executed his writing obligatory to one E. W. Andrews, for the sum in controversy; that Andrews, on the 15th March, 1840, *transferred the same by delivery* to Tyer, by means whereof it became Tyer's property, and that defendant was liable to pay Tyer; that Tyer,

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in December, 1844, assigned and delivered the same to plaintiff, by which the defendant became liable to pay the plaintiff. The usual breach then followed. At the same term, the defendant demurred, the demurrer was sustained, and leave given plaintiff to amend his declaration. The amended declaration is similar to the first, until after the allegation of Tyer's assignment and delivery of the writing obligatory to plaintiff, when it makes the additional averment that Andrews was dead at the time of the assignment by Tyer; that he died intestate; that no one administered; that defendant, on the day of Tyer's indorsement, and frequently thereafter, promised and bound himself to pay the bond to the plaintiff, with full knowledge that the plaintiff was the holder of the bond; that by means thereof the defendant became liable to pay, and an action accrued to plaintiff to have and demand of and from, &c. Then followed the usual breach. There was but one count in either declaration, and each upon the writing obligatory. The defendant plead three pleas to the amended declaration; 1st, *nil debet;* 2d, that Andrews, in his lifetime, never sold, assigned or transferred the bond to either Tyer or plaintiff; 3d, that at the commencement of the suit the plaintiff had no right, title or interest in the writing obligatory from Andrews, or from any other person to whom Andrews had sold, assigned, indorsed, or transferred the same. Both the latter pleas were sworn to. Defendant died, and Adlai Beard, his administrator, was regularly made defendant to the suit below. A verdict and judgment were rendered for the plaintiff; a motion for new trial was overruled, and bill of exceptions taken embracing all the testimony. On the trial, Tyer was offered as a witness, and proved that he bought the note of one A. M. Cowan in 1844; that Cowan was the book-keeper of Andrews, who was a merchant; the note was given for a suit of military clothes bought by John B. Griffin of Andrews, whilst Cowan was acting as such agent; that Andrews died in the latter part of the year 1840, or early part of 1841. John B. Griffin, Cowan, and Andrews, all lived in De Soto county, in this state; John B. Griffin moved to Tippah county shortly after 14th March, 1840; that after wit-

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ness bought the note of Cowan, he and the plaintiff went to see the defendant; that defendant said the note was just, and he would pay it if he could borrow the money; and that after witness and plaintiff left the defendant, witness sold the plaintiff the note for a full consideration. Jamieson, a witness for plaintiff, proved that the defendant bought two mules which he wished to pay the debt with, without himself being known in the transaction; that when the note was once presented by an agent of the plaintiff to the defendant for payment, the defendant answered evasively, and said after the agent left that he did not believe Cowan had come honestly by the note; he believed Cowan was an old scoundrel, and had hooked the note out of Andrews's office after his death.

Jamieson also stated, that John B. Griffin said he would not pay the note, as it had now run out of date, but that he would give an ox for the note that it might not longer hang over him, which statements were made at the time he said that he had doubts as to the manner in which Cowan had obtained this paper.

Beard, the administrator of Griffin, sued out this writ of error.

H. W. Walter, for plaintiff in error.

1. The plaintiff below had no *legal* title to the note sued on, to warrant his application to a court of law. No indorsement of the note was ever made by the payee, Andrews; and in fact the amended declaration discloses the death of Andrews, which rendered it morally impossible to procure such indorsement. This objection is fatal. Chitty on Bills, 252; *Bennet et al.* v. *McGaughy*, 3 How. 192; 15 John. R. 249.

2. The fact that defendant pleaded instead of demurring, and that a verdict was rendered, cannot help the matter. The statute jeofails cannot cure the defect. The cases of *Reaves et al.* v. *Dennis*, 6 S. & M. 89, and *Leflore* v. *Justice*, 1 Ibid. 385, are directly in point, and must settle this case. See also Walker's Rep. 24, 74, 172, 349.

3. The court below should have granted a new trial, there being no proof to support the verdict. It devolved upon the

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plaintiff below to show his title from Andrews to the note sued on. This he failed to do. The pleas of defendant are sworn to. *Moore* v. *Anderson*, 3 S. & M. 321; *Netterville & Boyd* v. *Stevens & Pillett*, 2 How. 642.

N. S. Price, for defendant in error.

1. The plaintiff below was the *holder* of the note; this raised a presumption of his right, which mere *suspicion* of want of title cannot overthrow. Sto. on Prom. Notes, 116, § 113; Chit. on Bills, 252.

2. Being *holder* of the bond, and the promise being direct to the holder to pay him, there was no need of an indorsement from Andrews.

3. The amended declaration was a count in debt upon the *promise* to which the bond was *inducement;* if defective in form it was not in substance, and the verdict must stand. *Cole* v. *Harman*, 8 S. & M. 562; H. & H. 591, § 11.

Per Curiam. This was an action of debt brought against the intestate of the plaintiff in error, upon a writing obligatory, made payable to one E. W. Andrews. Andrews died, and after his death, the writing obligatory was sold to one Tyer by Cowan, who had been the book-keeper of Andrews. Up to this time there was no indorsement of the instrument — it was not payable to bearer — nor does there appear to have been any administration upon the estate of Andrews. Tyer assigned the instrument to Griffin, who brought this suit upon it in his own name. It is in proof that the intestate admitted the justice of the debt, and promised to pay it to Tyer in the presence of Griffin before the assignment. One count in the declaration avers this promise. One of the pleas denies that Griffin had any legal title to the instrument, or any right to maintain the suit. There were a verdict and judgment for the plaintiff. There was no objection to the admission of any testimony, and no charge asked of the court. After a motion for a new trial had been overruled, the evidence was embodied in a bill of exceptions, and the case brought to this court.

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In every action at law, the plaintiff must show a legal title to the instrument sued on. The evidence in this case shows clearly that the legal title to the instrument never passed out of Andrews — there was no assignment by him, nor anything to divest his title. The plaintiff does not aver that he held title by assignment from the original payee, consequently the defendant could not be required to deny on oath, that the plaintiff was such assignee, since there was no averment to that effect. Of consequence, Griffin could not maintain this action. The verdict is therefore contrary to the law and the evidence, as the plea of want of title in the plaintiff is fully sustained.

The judgment must be reversed, and the cause remanded. Whether the plaintiff can hereafter maintain the action, is not for us now to determine. The promise of the decedent, as stated in the evidence, would have been binding on him to pay, if the plaintiff had held the title to the instrument. It was a waiver of any defence to the instrument, in the hands of a legal holder, who took it upon the faith of such promise; but it could not be held to dispense with proof of title. Otherwise one man might sue on the instrument, and another on the promise.

Judgment reversed and cause remanded.

George G. Torrey *vs.* Alvarez Fisk.

Johnson v. *Blassdale and Grubbs*, 1 S. & M. 20, cited and confirmed.

On the trial of a suit upon a note, the maker offered to prove that he signed the note in blank as a surety, with an express agreement that it was to be made payable to a bank in renewal of notes previously executed by him as surety for the same party, and that it had been filled up payable to a different person, and used for a different purpose; *held*, that the testimony without other proof, that the payee took the note with knowledge of the purpose for which it was executed, was irrelevant and inadmissible.

A party is not confined to any particular order in the introduction of his testimony; but when he offers testimony, and it is excluded, and he excepts to the exclusion, it must be shown affirmatively during the progress of the trial, that the testimony offered and excluded was relevant and pertinent.

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The high court of errors and appeals seldom entertains objections not made in the court below; yet, where testimony was offered below, and, on objection made, excluded, if the exclusion were proper, it will not reverse the cause because the judge below assigned an insufficient reason for its exclusion.

Whether the principal in a note is a competent witness for the surety in an action on the note against the latter, to prove that the note was signed by the surety in blank for one purpose, and used for a different,—*Quære.*

In error from the Claiborne circuit court; Hon. Stanhope Posey, judge.

Alvarez Fisk sued George G. Torrey on the following note, to wit:

"*Port Gibson, January* 1, 1839.

"$8,800. Twelve months after date we promise to pay to the order of Alvarez Fisk, eight thousand eight hundred dollars, value received payable at the Agricultural Bank at Natchez.

"Signed, H. & H. O. Anderson,
G. G. Torrey."

The defendant plead the general issue.

At the October term, 1846, the cause was submitted to the jury, who found for the plaintiff for the sum of $7,152.20, for which the court rendered judgment.

During the progress of the trial, the defendant offered to read in evidence to the jury the deposition of Hiram O. Anderson, one of the makers of the note; his deposition was in substance as follows to wit: That he was in 1842 discharged from his debts under the bankrupt law; the note sued on was given in consideration of a balance due upon a purchase of a stock of goods and store-house bought by H. & H. O. Anderson of H. Carpenter & Co. It was executed in consideration and in renewal of a prior indebtedness. H. & H. O. Anderson owed H. Carpenter & Co., as part of their indebtedness for the goods, &c. a note of $12,717.32, which H. Carpenter & Co. assigned to Alvarez Fisk; H. & H. O. Anderson paid Fisk part of this note, and executed a new note for $9,325.80, due on the 4th of January, 1839, for the residue.

On the 13th of March, 1839, H. & H. O. Anderson paid to Fisk

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on this last note $1,325.80, leaving a balance of $8000 due from 1st January, 1839, which amount was renewed, payable 1st January, 1840, with 10 per cent. interest added, making $8,800, for settlement of which the note sued on was given.

At the time Torrey signed the note, the witness thought the note for $9,325.80 belonged to the Agricultural Bank at Natchez. He wished, as a member of the firm of H. & H. O. Anderson, to make a payment on it, and renew the balance, and not knowing the amount he should have to pay, he got Mr. Torrey to sign a blank, with the understanding that it was to be filled up to that bank for the balance due after paying the call. He told Mr. Torrey, at the time he signed the note, that it was to be used in renewal of $9,325.80 held and due to the bank, and it was signed upon that understanding; he may have told Mr. Torrey that it was to be signed also by others, but does not remember distinctly upon that point; Mr. Torrey never waived to him any of the terms or conditions upon which he signed the note; nor had he spoken to him of its execution and delivery in the present shape; witness supposed at the time of using the blank with Mr. Fisk, that Fisk had obtained a discount of the note of $9,325.80 in the bank, and H. & H. O. Anderson failing to arrange it at maturity, Fisk took it up; and witness finding the same claim in Fisk's hands which he thought belonged to the bank, the witness did not hesitate to fill up the blank to Fisk, inasmuch as it was being used in renewal of the same debt for which it was intended, although passed to a different party from the one designated at the time Torrey signed it; the witness remembered but one instance in which the defendant, Torrey, became surety for H. & H. O. Anderson, on a debt due to an individual and in that instance he demanded and received indemnity before becoming surety.

To the reading of this deposition the plaintiff objected and the court sustained the objection and ruled out the deposition, on the ground that the witness was one of the makers of the note; and that his being a discharged bankrupt did not render him an admissible witness, nor entitle his deposition to be read. To which decision the defendant took a bill of exceptions.

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The defendant also offered to prove, by Thomas H. Wade, that the note sued on was signed in blank by defendant as security for H. & H. O. Anderson, upon the express agreement between Anderson and Torrey, that the note was to be filled up payable to the Agricultural Bank at Natchez, in renewal of a note held by that bank, and that the note was afterwards filled up payable to Fisk without the knowledge or consent of Torrey; but the plaintiff objected to the evidence, and the court sustained the objection and did not permit Wade to testify, on the ground that the plaintiff Fisk was not a party to the agreement, to which opinion also Torrey excepted, and tendered his bill of exceptions.

Torrey sued out this writ of error.

H. T. Ellett, for plaintiff in error.

1. H. O. Anderson was a competent witness for the defendant below. *Blagg* v. *Phœnix Ins. Co.* 3 Wash. C. C. R. 5; *Fox* v. *Whitney*, 16 Mass. 120; 1 Rawle, 197; *Baird* v. *Cochran*, 4 Serg. & R. 397; *Hepburn* v. *Cassel*, 6 Ib. 113, 115; 1 Greenl. on Ev. 531, § 385.

2. The testimony of Thomas H. Wade should have been admitted. It was good as far as it went, and it was no objection to its competency, that it did not go far enough to make out the defendant's whole case. The defendant may have views ready with proof to show that Fisk was privy to the agreement. See *Duncan* v. *Watson*, 2 S. & M. 135, 136.

3. It was not necessary to show that Fisk had any notice or knowledge of the extent of the authority of Anderson, in reference to the note signed in blank by Torrey; for it is proved that the note was given to Fisk in renewal of a balance due upon an old debt. 4 Paige, 215; Freeman's Ch. R. 338; 20 Johns. 637; *Harney* v. *Pack et al.* 4 S. & M. 229.

4. The bill of exceptions shows that the only objection made to Anderson's testimony was, that he was a party to the note, and the only objection to Wade's evidence was, that it did not show that Fisk had knowledge of the agreement.

5. This court will not notice objections to testimony, which were

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not made in the court below. *Randolph* v. *Doss*, 3 How. 205; *Prussel* v. *Knowles*, 4 How. 90; *Neeley* v. *Planters Bank*, 4 S. & M. 113; *Sessions* v. *Reynolds*, 1 S. & M. 730; 11 Wheat. 209; *Allen* v. *Smith*, 7 Halst. 168.

J. B. Thrasher, on same side.

1. The court erred in ruling out the deposition of H. O. Anderson, upon the ground that he was one of the makers of said note, and that his subsequent discharge as a bankrupt, from all his debts and liabilities, did not render him a competent witness for the defendant. *Walton* v. *Shelly*, overruled in *Jordain* v. *Lashbrooke*, 7 T. R. 601; 1 Greenl. on Ev. 477; *Murray* v. *Judah*, 6 Cow. 484; *Ludlow* v. *Union Ins. Co.* 2 S. & R. 119; *United States* v. *Smith*, 4 Day's R. 121; *Quimby* v. *Wroth*, 3 H. & J. Rep. 249; *Murray* v. *Marsh*, 2 Hayw. 290; 3 Mason's C. C. R. 5; 1 Greenl. on Ev. § 385.

2. The facts proposed to be proved by Wade, and the deposition of Anderson, constitute in law a valid defence. Fisk having received it for a precedent debt, he is equally affected with the fraud, as though he had notice. *Coddington* v. *Bay*, 20 Johns. R. 637. See also *Dickerson* v. *Tillinghast*, 4 Paige, 222; and *Arnold* v. *Patrick*, 6 Paige, 316; 2 Kent, 617; Story on Agency, 158; 1 S. & M. 21.

3. The only points raised and decided in the court below, constitute the only points which can be made in this court. *Wilson* v. *Owens*, 1 How. 126. Errors not excepted to, or points not made in the court below, will not be noticed in this court. See cases cited in Smedes's Digest, 77. All other points or defects in pleading are subject to be remedied by amendment at any time before the jury retire. H. & H. 591, § 14.

Eustis, for defendant in error.

1. Anderson was not a good witness. *Walton* v. *Shelly*, 1 Term R. 296; *Jordain* v. *Lashbrooke*, 7 Term R. 601; 3 Phil. Ev. (Cow. & Hill's notes) 77, and authorities cited.

2. If Torrey has this debt to pay, he can recover it back from Anderson, notwithstanding the discharge; his being a bankrupt

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did not therefore render him competent. *Frost* v. *Carter*, Caines's Cases in Error, 311.

3. Wade's testimony was properly ruled out. *Commercial Bank of Natchez* v. *Claiborne*, 5 How. Miss. R. 301.

Mr. Justice CLAYTON delivered the opinion of the court.

Upon the trial in the court below, the defendant offered to prove, by two witnesses, that he signed the note on which the suit is brought, as a surety; that the note was then blank, and that he signed it with an express agreement that it was to be made payable to the Agricultural Bank, in renewal of notes which he had previously executed as surety for the same party. The court below excluded the testimony, and the propriety of that exclusion is the only material point involved.

In *Johnson, Use, &c.* v. *Blassdale & Grubbs*, 1 S. & M. 20, this court said, "that he who signs a bill or note in blank, and delivers it to another, makes that other his agent, and authorizes him to fill it up with an indefinite amount. It is an unlimited letter of credit. Yet the rule must be received with this qualification: If there be in fact a limit to the authority, which has been exceeded, if a third person take the note with *knowledge* that the limit has been transcended, the note will not be binding in his hands as against the surety for the whole amount." To this principle we still adhere. There is nothing in the record to show that Fisk had any knowledge of the matter offered in evidence; and without notice he could not be affected by it. There was no offer to prove the existence of such notice. The testimony therefore was irrelevant, and was properly excluded. Had other evidence been adduced to show its pertinence, the result would have been different. The party is not confined to any particular order in the introduction of his testimony. But where the exception is to the exclusion of testimony, it must be shown during the progress of the trial to be relevant. *Lake* v. *Munford*, 4 S. & M. 319. If this were not the rule, the reversal would take place upon merely conjectural grounds, not upon what the record actually discloses.

Anderson, the principal in the note, was offered as a witness

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to prove the same facts, with the witness just referred to. He was rejected by the court, on the ground that he was a party to the note. Even if he were unobjectionable on this score, which need not be decided, the testimony itself, no matter by whom given, was inadmissible. The same reason operated to exclude it, in his case, as in that of the other witness. The decision was right, and this court will not reverse, because a wrong reason was assigned for it.

But it is urged that this court will not notice objections which were not made in the court below. Within certain limits that is true. If the testimony had been received below without objection, this court would very reluctantly listen to objections, taken here for the first time. But when, upon objections made, the evidence was excluded, if the exclusion were proper, it will not be right to reverse, because the judge may have assigned an insufficient reason.

Judgment affirmed.

A petition for a re-argument was applied for, principally on the alleged ground that the note was executed to Fisk for a *pre-existing debt.* The petition, however, was overruled.

GULLY M. BROWN *vs.* PHILIP POINDEXTER.

A note given to a person occupying public land, with the purpose of becoming a *preëmptor*, under the act of congress of June 22, 1838, for the purchase of the land from such occupier when his right of preëmption is perfected — to perfect which, the occupier agrees to occupy the land the prescribed time, and take the required steps, and then convey the title to the purchaser — is given for an illegal consideration, is in violation of the preëmption act referred to, and is void.

And if the maker of the note suffer a judgment at law to be rendered against him on the note, he cannot afterwards obtain relief against the judgment, in equity, on the ground that the intended preëmptor, by his negligence, which occurred after the judgment at law, lost his preëmption; the note being void, the defence at law was good, whether the other party carried out his contract, or not.

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On appeal from the vice-chancery court at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

Gully M. Brown filed his bill, to enjoin a judgment at law obtained against him by Philip Poindexter. He alleges that he and Poindexter entered into a written agreement (now lost) for the purchase by him, of Poindexter, of the latter's preëmption claim to certain public lands; that he gave Poindexter one hundred dollars in cash, and executed his note for another hundred, Poindexter agreeing to "hold possession of the land, by himself or another, so as to secure a preëmption right thereto, under the act of congress." Poindexter had sued him, and recovered a judgment on the note; since which, by his negligence, Poindexter had forfeited and lost his right to a preëmption, and a third party had obtained a certificate from the Grenada land office for the land, by which his claim was wholly defeated

The bill prayed for an injunction, which was granted; but afterwards, on motion, dissolved by the vice-chancellor, and the complainant appealed.

Watson, for plaintiff in error.

The complainant could not have defended himself at law, from the fact that his defence has arisen subsequently to the judgment. The rule is, that relief will be granted, where the defence could not at the time, or under the circumstances, be made available at law, without any laches of the party. 2 Sto. Eq. sec. 894; 6 Paige, 622; 7 Cranch, 332; 4 S. & M. 358, 424.

Chalmers, for defendant, contended,

1. That the covenant set out in the bill, was in violation of the act of congress, and void; which provides, that all contracts for the sale or transfer of pr. ëmption rights, before the issuance of the certificate, shall be utterly void, and that no action thereon shall be maintained. See act of congress, passed 22d June, 1838; and Instruct. of Com. of Gen. Land Office, p. 1024, Pub. Lands; and also, *Merrell* v. *Legrand*, 1 How. Miss. Rep. 150; and *Wooten* v. *Miller*, 7 S. & M. 380.

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2. Defendant contends, that, as there was a total failure of consideration, complainant should have set up his defence at law; and having failed to do so, without excuse, and his remedy at law being full and unembarrassed, he cannot come into a court of equity for relief. See *Green* v. *Robinson*, 5 How. Miss. Rep. 80; *Cowen* v. *Boyce*, Ib. 769.

Mr. Justice THACHER delivered the opinion of the court.

Brown contracted with Poindexter for the purchase of his preemption right to a tract of land. Poindexter, on his part, agreed to sell the right, to keep possession of the land for the purpose of procuring the certificates, and then to convey title to Brown. In pursuance of the contract, Brown gave Poindexter his two promissory notes for $100 each, one of which he paid, and upon the other of which Poindexter recovered a judgment against him. By the negligence of Poindexter, his right of preëmption became lost, and certificates for the land were procured by another. The bill of complainant, filed in the vice-chancery court, sets forth the foregoing facts, and alleges, that the neglect of Poindexter to comply with his part of the contract, took place since the rendition of the judgment upon the promissory note.

Upon motion, the vice-chancellor dissolved the injunction upon the judgment at law.

The contract, as described by the complainant, was illegal. The act of congress, to grant preëmption rights to settlers on the public lands, passed June 22, 1838, provides that "before any person, claiming the benefit of that law shall have a patent for the land, he shall make oath that he entered upon the land which he claims, in his own right, and exclusively for his own use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States should enure to the use or benefit of any one except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time, and any grant or conveyance which any person

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may have made in pursuance of such agreement or contract shall be void, except in the hands of a purchaser in good faith, for a valuable consideration, without notice." In consequence of this law, the contract was void, and could so have been shown in the trial at law. The negligence of Poindexter, charged, in the bill, not to have occurred until after the judgment, added nothing to the strength of the defence against the promissory note, which was full and ample at all times; moreover, and especially, a court of equity will not entertain a case based upon such grounds.

Decree dissolving the injunction, affirmed.

NATHAN HOOKER, SEN. *vs.* NATHAN HOOKER, JR. ET UX.

The probate court had no jurisdiction, prior to the act of 1846, (Acts 1846, p. 144,) to set aside a settlement made by a guardian or an executor, at a term subsequent to that at which the decree was made; the act of 1846, providing a remedy in the probate court for that end is prospective entirely in its operation, and does not apply to any settlement made prior to its passage.

The operation of a law must always be prospective, unless the contrary intention is manifest, even where the legislature had power to give it a retrospective effect.

It seems, that to give the law of 1846, referred to, a retrospective effect, and permit judgments and decrees final and conclusive, according to the then existing law, to be opened and inquired into under that law, would be in violation of the constitution.

ON appeal from the probate court of Carroll county; Hon. James S. Johnston, judge.

Nathan Hooker, jr., and his wife, filed their petition in the probate court, against Nathan Hooker, sen., on the seventh day of September, 1846, to impeach and set aside for fraud, the final settlement of the latter as guardian of the wife of Nathan Hooker, jr., made at the February term, 1842.

The defendant demurred to the petition, for the want of

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jurisdiction in the court; the demurrer being overruled, he appealed.

Sheppard, for appellant.

1. If the decree sought to be set aside was erroneous, the party aggrieved must resort to an appeal or writ of error. *Smith* v. *Denson*, 2 S. & M. 339.

2. The probate court has no power to set aside a final settlement for fraud. *Turnbull* v. *Endicott*, 3 S. & M. 304; *Hendricks* v. *Huddleston*, 5 Ib. 427.

3. Under the act of 1846, the petition makes out no case for a bill of review. Story Eq. Plead. 446, § 426; Ib. 431.

Brooke, for appellee.

1. This petition was filed under the law of 1846, p. 144. Under that law the court had jurisdiction; though the decree was prior to its passage, yet the law was purely remedial; the remedy existed before, in equity; the legislature have only given a similar remedy to another tribunal. *Calder and wife* v. *Bull and wife*, 3 Dallas, 386; 1 How. U. S. R. 316; 7 Johns. R. 488.

2. The chancery court had jurisdiction to set the decree aside for fraud. 2 Sto. Eq. 313; 13 Ves. 136; 2 Ib. 548, 549; 18 Ib. 126; 9 Ib. 297; 2 Leigh, 11. This jurisdiction is transferred to the probate court by the act of 1846.

Sheppard, in reply, insisted, that the law of 1846 could not retroact; the decree was final, and could not be re-opened. *Davis* v. *Minor*, 1 How. (Mi.) R. 189.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a petition, filed in the probate court of Carroll county, to set aside a final settlement made by the appellant, as guardian of the female petitioner, on the ground of fraud. The final account of the guardian was received and allowed by the court, in February, 1842. There is a demurrer to the relief prayed for.

It has been repeatedly decided, that the probate court had no

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jurisdiction to set aside a settlement made by a guardian or an executor, at a term subsequent to that at which the decree is made. 5 S. & M. 130, 422, 751. If the decree were obtained by fraud, the remedy was in chancery. *Turnbull* v. *Endicott*, 3 S. & M. 304. This was the settled doctrine of this court prior to the statute of 1846, in regard to the powers of the probate court. Pam. Acts, 144.

It is insisted that this cause is embraced by the act of 1846, notwithstanding the settlement in question was made several years before its passage. It is true, the law provides a new remedy, but there is nothing to show that the legislature intended to give it a retrospective effect. The operation of a law must always be prospective, unless the contrary intention is manifest, even in cases in which it would be admissible to the law-making power, to give it a retrospective effect.

By the law in force at the time this settlement was made, it was final and conclusive, so far as the action of the probate court was concerned. It might operate harshly and unjustly on the appellant to take away the conclusive character which then attached to it. Indeed, the power of the legislature to open a judgment, and unsettle rights previously ascertained and declared by a competent tribunal, would hardly be asserted. But we can see no evidence of any such intention in this instance.

The order of the court, overruling the demurrer, is reversed, and the bill dismissed for want of jurisdiction.

JOHN M. ANDERSON *vs.* EDWARD C. WILKINSON, *et per contra.*

The complainant, in a bill of interpleader, cannot, after the filing of the bill, set up a right in himself to the fund in controversy; by his bill he admits he has no interest in the fund, and leaves it to the defendants to adjust their conflicting claims.

When the complainant, in a bill of interpleader, has brought the fund in controversy into court, with interest up to the time of filing his bill; and after filing his bill the complainant sets up a claim, as a creditor of one of the

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defendants, to the fund, and the claim is adjudged to the other defendant, the complainant will not be chargeable with any interest from the time he brought the money into court.

On appeal from the superior court of chancery; Hon. Stephen Cocke, chancellor.

Edward C. Wilkinson filed his bill in the superior court of chancery, in which he states that he executed his note for a certain consideration, which came lawfully into the hands of Hiram G. Runnels, who pledged it as collateral security to certain persons unknown to complainant, who had assigned it to John M. Anderson, for whose use complainant had been sued on the note. That Runnels had notified him that the note was still his property, and that he must not pay it to any one but himself.

The bill proceeds: "Your orator further showeth unto your honor, long before the institution of said suit, and before your orator had notice that the note had passed from the hands of said Runnels, your orator, knowing he owed the said Runnels, became liable for him, the said Runnels, in a larger amount than the amount expressed in the face of said note, and that since said suit has been instituted your orator has been compelled to pay the same, which sum the said Runnels now owes your orator, or at least the sum beyond the amount of said note.

"Your orator further showeth that said Runnels is insolvent, and that unless your orator can protect himself against the recovery sought against him on said note, he will be without remedy in the premises.

"Your orator further shows, that if the legal or equitable title to the note was in Runnels, when the latter became in debt to your orator, your orator is entitled in law to have the said debts set off, the one against the other.

"Your orator further showeth that he is ready and willing to pay the said amount of money mentioned in said note, to whom the same is justly due, and for that purpose now brings the same into this honorable court."

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The bill expresses the apprehension of the complainant, lest he be compelled to pay the money twice; asks for an injunction against the suit at law, and prays that Runnels and Anderson may be compelled to interplead, and that the court would adjudge to whom the note belonged.

In pursuance of an order of court the complainant brought the money due on the note into court, with interest up to the filing of the bill.

Anderson answered the bill, and set out his right to the note.

The bill was taken for confessed as to Runnels; proof was taken, and the chancellor decreed that Wilkinson's claim was not equitable, dismissed his bill, and directed that he should pay the costs of the suit. The money he awarded to Anderson, but refused to allow him interest since the filing of the bill. Anderson appealed; and Wilkinson entered a cross-appeal, because the chancellor had not decreed the whole sum to him.

Both appeals were prosecuted.

A. C. Baine, for Anderson,

Cited Story's Eq. Pl. § 297, *b*; *Bedell* v. *Hoffman*, 2 Paige, 199; *Hamer* v. *Johnston*, 5 How. (Mi.) R. 198; 1 Johns. Ch. R. 581; 2 Ib. 442, 478; 7 How. (Mi.) R. 360; 1 S. & M. 531.

W. R. Miles, for E. C. Wilkinson,

Cited 1 Smith's Ch. Pr. 474, 475; How. & Hutch. 373, § 12; Rev. Code of Va. chap. 125, § 5; 2 Wash. R. 233, 255; 6 Cranch, 204; 1 Munf. 533; 19 Johns. R. 49; 1 Tuck. Com. 335; *Feazle* v. *Dillard*, 5 Leigh, 30; 8 Alabama R. 217; 1 Dev. Eq. 151; 2 Ib. 31; *Abbey* v. *Van Campen*, Freem. Ch. R. 273.

Mr. Justice Clayton delivered the opinion of the court.

This was a bill of interpleader, filed by Wilkinson in the superior court of chancery, against John M. Anderson and Hiram G. Runnells, requiring them to interplead and state their several claims, to a certain note executed by the complainant, so that

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the court might adjudge to whom of right said note belongs, in order that he might be protected in its payment, and not have to pay it twice. The complainant, also, on a subsequent day, paid the amount of the note into court, with interest up to the time of filing the bill.

An answer was filed by Anderson, showing his title to the note, and the bill was taken for confessed against Runnels. The proof fully sustains the title of Anderson, as against his co-defendant.

The complainant afterwards set up claim to the money, in his own right, on the ground that Runnels, who once held the note, became indebted to the complainant, before notice of the transfer of the note to Anderson.

The chancellor decreed the sum paid into court, to Anderson, without interest from the time of payment; from this decree Anderson appealed, because he claimed interest, on account of the claim set up by Wilkinson to the fund.

Wilkinson appealed because the whole fund was not decreed to him.

The principles which govern bills of this character, are thus stated in a recent case: "The definition of interpleader cannot now be disputed. It is where the plaintiff says, I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it, between yourselves. The case must be one in which the fund is matter of contest between two parties, and in which the litigation between those parties will decide all their respective rights in regard thereto." *Hoggart* v. *Cutts*, 1 Craig & Phill. 204; 3 Daniel's Ch. Prac. 1753. These principles have been frequently recognized in this court, and their application is decisive of this case.

The decree is correct in all respects, and is affirmed; each appellant to pay the costs of his own appeal; and the costs of the court below, to be paid as therein directed.

Decree affirmed.

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WILLIAM A. COPPAGE *vs.* JAMES BROWN.

B. owed J. B. seventy-one bales of cotton, and C. owed B. forty bales of cotton, due each in December, 1840; in June, 1841, C., at B.'s request, drew a blank bill of exchange, and gave B. power to fill it up with the value of the forty bales of cotton he owed B., and also with the value of thirty-one more bales, in order that B. might give the bill to J. B. in payment of the seventy-one bales due by B. to him; B. and J. B. calculated the value of the cotton at ten cents per pound, and filled the bill up with the sum thus ascertained; C. alleging that cotton was worth but *seven* cents per pound, in December, 1840, when the cotton was due, sued J. B. to recover the three cents per pound over paid; it was proved that cotton was worth but seven cents in December, 1840, but in the spring of 1841 had been worth ten cents; the jury found for the defendant. *Held*, that the verdict was correct; if C. had any claim it was against B., and not against J. B.; the two latter had the right to make their contract in their own way, and settle on their own terms, and in the absence of all fraud the agreement between them would not be set aside.

IN error from the circuit court of Lafayette county; Hon. Hugh R. Miller, judge.

The facts are sufficiently stated in the opinion of the court.

A. H. Davidson, for plaintiff in error,

Cited 5 Cow. 222; 3 Wheat. 200; 9 Wend. 129; 5 Hayw. 85; 4 Rand. 346; Peters Cir. Ct. Rep. 85; 8 Wend. 435; 8 Pick. 9; 6 Har. & John. 273; Ib. 297; 1. Ib. 444; 2 Wend. 90; 2 Hill, 132.

Howry and *Hayes*, for defendant in error, contended that if Coppage was injured or wronged, he must look to Bradford for redress and not to Brown.

Mr. Justice Clayton delivered the opinion of the court.

James Brown, the defendant, had sold to M. Bradford a tract of land, for which he was to be paid two hundred and fifty

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bales of cotton, weighing four hundred pounds each; one half to be delivered 25th December, 1840, and the other twelve months thereafter. When the first payment became due, Bradford delivered only fifty-four bales of cotton, leaving seventy-one unpaid. Coppage had purchased land of Bradford, also to be paid for in cotton, and forty bales were due. In June, 1841, Bradford gave Brown a letter to Coppage, requesting him to draw a bill of exchange on his commission merchant in New Orleans, for the amount of the forty bales which he owed him, and requesting him also to make the bill for an amount sufficient to cover thirty-one bales more, the amount of his indebtedness to Brown.

Coppage, in accordance with this request, drew a blank bill and wrote to Bradford, giving him authority to fill it up with the value of the seventy-one bales. Brown carried the bill and the letter to Bradford; they calculated the value of the cotton at ten cents per pound, and filled up the bill with the amount thus ascertained, with interest from the time when the cotton was to have been delivered. In December, 1840, cotton, according to the proof was worth only seven cents per pound, but had been sold at ten cents in the spring of 1841.

This suit was brought by Coppage against Brown, to recover the difference in value between the cotton at seven cents and at ten cents per pound, alleging that Brown was only entitled to the value of the cotton at the time when the note fell due, 25th December, 1840. The jury found a verdict for the defendant.

If Coppage have a cause of action against any one, a point which we need not decide, it is against Bradford rather than Brown. He gave Bradford authority to fill up the bill of exchange, without limit as to the price of the cotton — that matter was arranged between Brown and Bradford — there was no excess of the authority, and Brown is in no manner liable to Coppage.

Had Brown been compelled to sue Bradford for the value of the cotton, its value at the time it was to have been paid, would have formed the measure of damages. Yet as the contract had not been complied with, it was surely competent to Bradford to

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agree to allow Brown what cotton was worth at the time of the settlement. It was in proof that Brown sold his own crop in the spring of 1841 for ten cents. The agreement between them as to the price, was not one which a court could set aside, unless on the ground of fraud, of which there is no proof. Parties who are competent, may make their own contracts, unless they are contrary to law, or rendered void by fraud.

No error is perceived in the judgment, and it is therefore affirmed.

SILAS F. TROTTER *vs.* ELIZA WHITE, Administratrix of James White, deceased.

Under the foreign attachment law, (How. & Hutch. 520, § 63,) where there is a bill pending in equity against a non-resident defendant, who is indebted to the complainant, and a home defendant who has effects in his hands of the non-resident, upon the affidavit of the absence of the non-resident and of the indebtedness, the court may make an order requiring the home defendant to give security to have the property in his hands forthcoming, to abide the ultimate decree of the court; or in default thereof that the property shall be delivered to the complainant upon his giving like security.

And it seems that if the effects in the hands of the home defendant are claimed by him as his own, yet if the bill alleges them to be the property of the non-resident, claimed by the home defendant under a fraudulent assignment or sale from the non-resident, the attachment will lie, and the same relief may be extended as if the home defendant laid no claim to the effects in his hands.

The complainant, in a foreign attachment bill, may, *at the time of filing the bill*, upon a sufficient and proper showing for it, obtain an injunction against the transfer or removal of the effects in the home-defendant's hands.

Where administration is taken out in another state, and the administrator there, in the course of administration, takes notes payable to himself *as administrator*, he may maintain a bill in his own name, in the courts of this state, to enforce their collection; and it will not make any difference that he styles himself, in such bill, administrator.

ON appeal from the district chancery court at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

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Eliza White, describing herself as administratrix of James White, deceased, of Washington county, Virginia, alleges in her bill in substance, that Joseph Trotter, a non-resident, is indebted to her in about the sum of twenty-five thousand dollars, on notes payable to her, to secure which amount he executed to her in the state of Louisiana, a mortgage on upwards of fifty slaves, and between seventeen and eighteen hundred acres of land, on which he had previously executed a mortgage, to secure a debt of comparatively small amount; that after this, Trotter and his son, Silas F. Trotter, and others, fraudulently combined to defeat complainant in the collection of her debt, and with this view procured a colorable and fraudulent sale to be made of the mortgaged slaves, to Silas F. Trotter, who, under this pretended sale, took possession of the slaves, and now holds them in Tunica county, within the jurisdiction of the court; that this sale was fraudulent and void; and the slaves bound for complainant's debt under her mortgage; that under whatever pretext Silas F. Trotter holds the slaves, they are liable to complainant's debt, and that she is fearful they will be removed beyond the limits of the state, and that she will be defeated in the collection of her debt, unless she can obtain the aid of a court of chancery; an attachment and injunction are prayed for. The bill was sworn to by an agent of the complainant.

An attachment and injunction were granted and executed on Silas F. Trotter.

At the return term of the writs, the vice-chancery court discharged the original attachment and injunction; but, on the affidavit of the complainant's agent of the absence from the state of Joseph Trotter, and on her motion the court, "to insure the safety of the slaves, the subject of litigation in the cause, to abide the future orders or decrees of the court, adjudged and ordered that the sheriff of Tunica county do take or hold said slaves in his possession and custody, and them safely keep until the further order of this court, unless the said Silas F. Trotter will execute to the complainant bond in the penalty of thirty thousand dollars, with unquestionable security, to be approved by the clerk and master of this court, with condition to keep said

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slaves, in complainant's bill mentioned, and on which the attachment aforesaid was levied, within the jurisdiction of this court, and to have them forthcoming to abide the future orders and final decree of this court in the premises, upon the execution of which bond by the said Silas F. Trotter, the said sheriff of Tunica county shall deliver said slaves to him; but should the said Silas F. Trotter refuse or fail within thirty days from this time to execute bond, with security as aforesaid, then upon the execution by complainant to the said Silas F. Trotter, of a bond in the like sum or penalty of thirty thousand dollars, conditioned to pay and satisfy to said Silas F. Trotter, all damages which may accrue to him from this order, should it be decided that said slaves were not liable to the debt so due complainant, from the said Joseph Trotter, and also to keep said slaves within the jurisdiction of this court, and have them forthcoming to abide its future orders and final decrees in the premises, the said sheriff of Tunica county will deliver said slaves to the complainant, or her duly authorized agent; and should neither of said parties execute bond as aforesaid, then the said sheriff of Tunica county will retain and keep possession and custody of the said slaves, and hold them subject to the future order and decree of this court."

Silas F. Trotter appealed from this order.

C. Scott, for appellant.

1. As administratrix the complainant could not maintain this bill, without letters in this state.

2. The original attachment was improvidently issued at the filing of the bill. 1 S. & M. 441.

3. The case made out by the bill is not included in the statute; effects of the non-resident may be attached; here distinct and different relief must be granted, a fraudulent sale be set aside, and other steps taken before it can be determined whether effects of the non-resident are in the home-resident's hands; this was not contemplated by the statute. How. & Hutch. 520.

4. The bill made out no case for an injunction. 2 Story's Eq. 959, et seq.

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5. The case stated in the bill falls under the head of the general jurisdiction of a court of equity, and not under the jurisdiction conferred by the statute.

Lucas, *Watson*, and *Clapp*,

Insisted that the order was properly granted; they cited *Comstock* v. *Rayford*, 1 S. & M. 441; *Gasget* v. *Scott*, 9 Yerg. 246; *Gibson* v. *White*, 3 Munf. 94; *Kelso* v. *Blackburn*, 3 Leigh, 299.

Mr. Justice THACHER delivered the opinion of the court.

This is a writ of error to the district chancery court at Holly Springs.

Eliza White filed her bill, alleging that Joseph Trotter, a non-resident, was indebted to her in a large sum; that he secured the debt by a mortgage in Louisiana upon a tract of land, and numerous slaves, which property he had previously encumbered by another mortgage to secure another debt of a smaller amount; that the slaves, by means of a fraudulent and void sale in Louisiana, came into the possession of Silas F. Trotter, a resident of this state, and are now within the jurisdiction of this court; and that she is fearful that they will be removed from this state. Upon filing the bill, an injunction and attachment were procured and issued. At the return term of process upon the bill, which had been executed upon Silas F. Trotter, an order was made discharging the attachment, but an affidavit having been filed as to the non-residence of Joseph Trotter and other defendants, a further order was made to secure the property to answer the final decree, in which it was permitted to either Silas F. Trotter or the complainant, upon executing a required bond, to take and keep possession of the slaves in the mean time, the privilege being first accorded to Silas F. Trotter.

The defendant below has sued out this writ of error, and, therefore, we are only required to pronounce upon the propriety of the order made to secure the property pending litigation, as by that order alone can he claim to have been prejudiced.

The statute H. & H. 520, § 63, by virtue of which this order was made, authorizes it upon certain conditions. The first con-

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dition is, that a suit must have been commenced "for relief in equity." The statute does not restrict the remedy to secure the property to suits commenced for any particular or peculiar relief in equity, but allows it in all proper suits in equity where from their nature it is applicable and fit. In this case, the bill, upon its face, shows a sufficient ground for equitable interposition and the security of the property is essential to effectual relief ultimately. In the next place, the statute requires the existence of a non-resident defendant, and, as to the character of the suit, others within the state having effects of the absent defendant. Here, the bill charges that the sale of the property in Louisiana to Silas F. Trotter was fraudulent and void, and hence alleges that the title has never, in point of law, passed from Joseph Trotter, but still remains in him. No appearance of the absent defendants was made, or security entered by them for performing decrees, but affidavit was duly made of their non-residence, and process had been served upon Silas F. Trotter, the defendant in this state. All things to be done or shown by the requisitions of the statute and according to law, appear by the bill and proceedings. Hence we cannot see what objection can reasonably be taken to this order, it having been granted in a case in all respects according with the statute. Any argument upon the hardship of the case or the violence of the remedy is out of place, and, in fact, the statute but carries out a leading principle of equity jurisdiction, which permits and requires such a tribunal to ensure the presence of property, in a proper case, to respond its concluding decrees. Besides, as to the question of the propriety of such an order, this court has said, in *Comstock et al.* v. *Rayford et al.* 1 S. & M. 442, which was a case in most respects similar to the present, that, "when the home defendant has been served with process, and at the return term an affidavit is made as to the absence of the other defendant, the court may there make an order for the safe keeping of the effects, and require surety for their production to answer the decree, or may direct them to be delivered to the complainant upon his giving surety for the return." Upon principle, as well as upon the authority of our own decisions, this order was legitimately made.

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In the case of *Comstock et al.* v. *Rayford et al.*, we intimated that a party had a right to obtain an injunction, at the time of the bill filed, upon a proper case, to prevent the transfer or removal of the property involved. We take this occasion to express decisively the opinion that such an exercise of power in equity, upon a sufficient and proper showing for it, would be in keeping with the true end and aim of equitable jurisdiction, because, without it, proper and full relief might be entirely defeated in some cases.

The objection taken, in the present case, that the suit has been instituted by Eliza White, as administratrix, without having shown that letters of administration have been procured by her in this state, cannot avail. The notes, evidencing the debt, were made payable to her as administratrix, and she can prosecute the suit as in her own name.

Decree affirmed.

GEORGE H. KEERL *vs.* THOMAS J. N. BRIDGERS.

In this state contracts and liabilities of copartners are joint and several; and any one of the partners may be sued and is liable for the whole indebtedness. Where, therefore, a firm, consisting of three persons, was sued upon an account, for which it was proved that two of the firm had executed to the plaintiff their note; and the suit was dismissed as to those two, and stood against the third partner alone: it was *held*, that it was a question of fact for the jury to say, whether the note of the other two was received by the plaintiff in extinguishment and satisfaction of the debt of the three; if it were, the third partner would be discharged from the debt; otherwise not.

IN error from the circuit court of Yalabusha county; Hon. Francis M. Rogers.

George H. Keerl sued William Armour, Henry Lake and Thomas J. N. Bridgers, in assumpsit upon three open accounts. He discontinued his action as to Armour and Lake. On the

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trial, the contracting of all the accounts by the defendants as partners was proved. It was also proved, that Armour executed and delivered to Keerl promissory notes for two of the accounts sued on; the notes were executed in the name of Armour and Lake, were unpaid and in the possession of Keerl. On this testimony, the court, when asked by the plaintiff, refused to instruct the jury "that the plaintiff is not precluded from his action upon the accounts for which the notes were given, in the absence of all proof that the notes were accepted in absolute payment of those accounts;" but at the instance of the defendants, the court instructed the jury, "that for the accounts sued on and embraced in the notes signed Armour and Lake, the plaintiff could have no action except upon those accounts." The jury found in favor of Keerl, only for the account not embraced in the notes executed by Armour. Keerl moved for a new trial; his motion was overruled, and he prosecuted this writ of error.

William G. Thompson, for plaintiff in error.

Bridgers was liable with Armour and Lake, on the accounts at the time they were contracted. Keerl had a right to treat their liabilities as separate, under our statutory law; and so he might *change the form* of his claim as against two of the partners, (which is all that was done here) without affecting his claim against the third partner.

William Thompson, on same side.

Snider and *Hutchins*, on same side.

1. The record furnishes no proof that the notes were given in absolute payment of the accounts.

2. The execution of a note by one of several partners for an antecedent debt due by all, will not extinguish their liability. 1 Hill's Rep. 516; 5 Ibid. 448. It only separates the right of action during the time allowed for payment. 8 John. R. 304; 5 Ibid. 68; 9 Ibid. 310; Smith's Mer. Law, 436; 7 Harr. & J.

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32, 92; 15 S. & R. 162; 3 Call, 234; 2 Watts, 121; 2 Hall, 547; 3 McCord, 484; 1 Dall. 420.

3. The case of *Slocumb's Adm'r.* v. *Holmes's Adm'r.*, 1 How. (Mi.) 139, is distinguishable from this, in this; in that the note of *all the* partners, was held to merge the account of all; here it is but of two of the partners; it amounted to but an account stated. *Truman* v. *Hurst*, 1 Term R. 40; *Davis* v. *Tiernan*, 2 How. (Mi.) R. 786.

A. H. Davidson, for defendant in error,

Insisted that the accounts were merged in the notes. He cited 1 How. (Mi.) R. 139; 6 Cranch, 264; 5 John. 72; 11 Ib. 518; 12 Ibid. 409; 14 East, 239; 5 Barn. & Ald. 925; 4 Esp. R. 89; 5 Ibid. 122; 24 Pick. 13.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of assumpsit in the circuit court of Yalabusha county, on an account, created by the firm of Armour, Lake & Bridgers, with the plaintiff.

It was in proof that the articles on which the accounts were founded, were furnished the defendants, and that the prices were correct; but that the note of Armour & Lake, two of the firm of Armour, Lake & Bridgers, had been given for all of the accounts except one. The suit was dismissed as to Armour & Lake, and stood against Bridgers alone. It was tacitly conceded, that the plaintiff had the right to recover on the account not embraced in the notes, and for that amount a verdict was rendered in his favor. But as to the others, the court, at the instance of the defendant, instructed the jury, "that for the accounts sued on and embraced in the notes of Armour and Lake, the plaintiff could have no action, except upon those notes." This charge was excepted to, and the cause turns upon that exception.

In this state the contracts and liabilities of copartners are joint and several. H. & H. 595. Hence any one of the partners may be sued, and he is liable for the whole indebtedness. *Dahlgren* v. *Duncan et al.* 7 S. & M. 294.

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In our view it is a question of fact, whether the notes of Armour & Lake were intended to be received in absolute ex tinguishment of the former debt, and whether it was agreed that the plaintiff should accept them as his sole debtors, and should take their notes by way of satisfaction for the debt. If such were the agreement, the receipt of the notes would be a discharge of the defendant Bridgers, otherwise not. Story on Partnership, 239, sec. 155; *Thompson* v. *Percival*, 5 B. & Adol. 925; Eng. C. L. R. 245.

The instruction of the court not being in conformity with this opinion, the judgment must be reversed, and a new trial awarded.

THOMAS GREENWOOD *vs.* JOSEPH LIGON.

A vendor of land who stipulated by his title bond to make the vendee "*a good and perfect deed*" to the land sold, does not discharge his covenant by the execution of a deed good in point of form; but fully to comply with his covenant, he is bound to make a good and perfect title to the land, and to remove any existing incumbrance or protect the vendee against it.

And it seems, that the failure of the vendor to procure his wife's relinquishment of dower, would be a breach of the covenant to make "*a good and perfect deed.*"

Technical rules are not so much to be consulted in the construction of covenants, as the real meaning of the parties, where it can be gathered from the instrument itself; and that construction should be favored which is obviously most just.

IN error from the Yalabusha circuit court; Hon. Francis M. Rogers, judge.

Thomas Greenwood sued Joseph Ligon in debt upon the latter's bond, conditioned in the penalty of sixteen thousand dollars, "to make to the said Thomas Greenwood, his heirs, &c. a good and perfect deed" to the lands described in the bond. The defendant plead, 1. That the plaintiff had not demanded a deed; 2. The defendant's readiness and willingness to make a deed, and the plaintiff's refusal to receive it; 3. The execution

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and delivery of a deed to the plaintiff, which the latter then had; 4. The defendant's readiness to make a deed, and the tender of one with his plea; 5. That under the condition of the bond, it was the plaintiff's duty to tender a deed to defendant, to execute, which he had never done. The plaintiff replied, traversing the pleas. On the trial it was admitted, that the defendant was a married man, and his wife had not joined in the deed he had tendered to the plaintiff, which was his individual warranty deed; the plaintiff refused to receive it without such relinquishment, and he had never made the effort to procure the relinquishment. The plaintiff tendered him a deed prepared for the wife's relinquishment; he refused to have it executed. All the purchase-money had been paid.

The court refused to instruct the jury, 1. That by the expression to make a good and sufficient deed, is meant a deed which conveys good and perfect title to the premises; 2. That if the jury believe the vendor's wife could be entitled to dower in the land, then for the proper performance of the condition of the bond, the wife of the obligor should join in the deed, and a refusal to execute such a deed jointly with his wife, would be a breach of the covenant.

The jury found for the defendant, and the plaintiff sued out this writ of error.

Sheppard, for plaintiff in error, contended, that the words "a good and sufficient deed," meant not merely one good in form, but one that conveyed *a good title*. *Clute* v. *Robison*, 2 John. R. 595; *Judson* v. *Wass*, 11 Ib. 527; *Carpenter* v. *Bailey*, 17 Wend. 247; *Jones* v. *Gardiner*, 10 John. R. 268.

Fisher, for defendant in error, cited 16 John. R. 268; 20 Ib. 130; 15 Pick. 550.

Acee, for plaintiff in error, reviewed the authorities cited by Mr. Fisher, and contended that they were inapplicable. He cited further, *Rucker* v. *Lowther*, 6 Leigh, 259; *Collins* v. *McCargo*, 6 S. & M. 128.

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Mr. Justice CLAYTON delivered the opinion of the court.

There is but a single question presented by this record. Whether a vendor of land is bound by his title-bond, to make the vendee "a good and perfect deed" to the land sold, whether a deed good in point of form, is a compliance with the covenant, or whether he is bound to make a good and perfect title to it, and to remove any existing incumbrance upon it, or protect the vendee against it. Or, to come more precisely to this case, whether, if the vendor tendered his own deed, without procuring his wife's relinquishment of dower, such deed satisfied his covenant.

There is some contrariety in the decisions on this subject, and without going into an elaborate investigation of them, we shall adopt that rule, which most comports with the ends of justice and the intention of the parties. Technical rules are not so much to be consulted, in the construction of covenants, as the real meaning of the parties, where it can be gathered from the instrument itself; and that construction should be favored which is obviously most just. *Holloway* v. *Lacy*, 4 Humph. 468; *Killian* v. *Harshaw*, 7 Iredell, 498.

In *Carpenter* v. *Bailey*, 17 Wend. 247, the court says, "it was the *title* to the premises which the defendant stipulated for, not a *piece of parchment* good in form, but waste paper in effect, for the purpose of transferring the title."

In *Gray & Reader* v. *Darby's Lessee*, Mart. & Yerg. 403, the court said, "the legislature by the term *grant*, meant the land covered by the grant, and not merely a paper purporting to be a patent."

Words are to be taken in that sense, in which they were most probably understood by the person to whom they are addressed, or which is the same in effect, most strongly against the party using them. We cannot doubt, but that the vendee in this case understood by the terms a "good and perfect deed," that he was to obtain a good and perfect title for his money, and not merely a right of action on the deed, after the insufficiency of the title had been established by suit, and eviction under it. See *Liddell* v. *Sims*, decided at this term. 9 S. & M. 596.

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The court below refused to give a charge asked by the counsel of the plaintiff, which was in accordance with the principles herein contained. For this refusal, the judgment must be reversed, and a new trial granted.

JOHN BRADLEY *vs.* THE STATE OF MISSISSIPPI.

An indictment, which charges the accused "with an assault and battery, with a deadly weapon upon a certain slave, *with the intent to commit manslaughter*," can be construed to be an indictment for only an aggravated assault. It is not an indictment for *an assault with intent to kill*, by which is understood and has been held, an intent to commit murder.

On the trial of a man, indicted for an assault and battery, with a deadly weapon on a slave, with intent to commit manslaughter, the proof by a single witness that the prisoner was seen with a knife in his hand in pursuit of the slave when he was stopped by the witness, and then made threats against the life of the slave; *held*, to be entirely insufficient to warrant the prisoner's conviction.

IN error from the circuit court of Monroe county; Hon. A. B. Dawson, judge.

John Bradley, in April, 1847, was indicted for having, with a "dirk knife, being a deadly weapon, cut, beat, bruised, maimed and ill-treated, with intent, in and upon one Isham, a slave of William Cozart, wilfully, maliciously and feloniously to commit manslaughter."

On the trial, the jury found the prisoner guilty; and the court sentenced him to jail for a period of two years.

One McWilliam, the only witness for the prosecution, testified that he saw the prisoner run after the negro about ten steps behind him with an open dirk knife in his hand; witness called upon the slave to jump the fence; upon which the prisoner stopped the pursuit, stating that the slave might then escape, but he would catch him and have his blood; the prisoner then waited until the witness came up to him. This was all the proof.

The prisoner sued out this writ of error.

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J. W. Robb, for the plaintiff in error.

1. The prisoner is charged in the indictment with no offence; there being no such crime known to the law as an intent to commit manslaughter, and that a man could be guilty of such an intent is absurd, by the very nature of the crime as defined by the statute.

2. Because it appears, from the testimony, no assault was made; Bradley not being within striking distance of the boy he is accused of assaulting; to make the crime of assault, the intent, coupled with the ability to do present harm, must concur. Now this latter ingredient was wanting; therefore he made no assault. 1 Hawk. P. C. 110; 3 Black. Com. 120.

3. Because the finding of the jury was contrary to the evidence which is good cause for granting new trial. Graham, 368.

John D. Freeman, attorney-general, for the state.

Mr. Justice THACHER delivered the opinion of the court.

This is an indictment preferred by the grand jury of Monroe county against John Bradley. The indictment charges the accused with an assault and battery with a deadly weapon, upon a certain slave, "with the intent to commit manslaughter."

This indictment can be construed only to be an indictment for an aggravated assault. It is not an indictment for an assault with an intent to kill, by which is understood and has been held, an intent to murder.

The evidence, that of a single witness only, shows that the defendant below was seen with a knife in his hand in pursuit of the slave when he was stopped by the witness, and that he then made threats against the life of the slave.

The evidence is entirely insufficient to warrant the conviction, and the judgment of the circuit court was erroneous.

The judgment must be reversed and a new trial awarded in Monroe circuit court.

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HENRY W. ANDERSON ET AL. *vs.* JOHN C. PRYOR, Judge of Probate of De Soto county.

It is competent for a volunteer in the army of the United States, in Mexico, who is a citizen of this state, to make his last will and testament while abroad in Mexico.

And a letter, written by such volunteer, from Mexico, throughout in his own handwriting, in which he expresses his desire and intention, in case of his death, that his property should go to his niece, will be properly admitted to probate on his death, as his last will.

While a letter from the same person, in which he expresses his willingness to aid his brother, who was in difficulties, with all his property, was not testamentary, and therefore not entitled to probate.

IN error from the probate court of De Soto county; Hon. John C. Pryor, judge.

Charles Yarborough, in August, 1837, applied for the probate of the alleged will of Garland Anderson.

W. W. Cockrun testified that the deceased, when he left home for Mexico, as a volunteer in the first Mississippi regiment, in the summer of 1846, was of age, and left with the witness two slaves, and told him if he never returned he wanted him to see that his niece, Martha Yarborough, obtained his property. After his departure the witness obtained a letter from him, dated June 21, 1846, in which he says: "If I never come back ma promised my property should go to Martha Yarborough." In another letter, dated July 19, 1846, he says: "I wish you [to] inform Yarborough what I told you concerning my property; ma promised me it should go as I wished it, to my niece Martha." The witness produced the letters, from which these are extracts; and also a letter to Martha Yarborough, from the deceased, dated October 27, 1846, in which he says: "Your grandma promised me to let you take Jake and Nan, if I should not get back." These letters were all in the deceased's handwriting, including the signature.

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W. B. Spinks proved also the handwriting of the letters; and that he was a messmate in the army with the deceased, and had been told by him, if he did not return home he wanted his niece, Martha Yarborough, to have his property, and wanted witness to write his will for him in her behalf, but he never found it convenient to do so.

S. M. Allen, besides proving the handwriting, testified that the deceased was a member of the same company in the first Mississippi regiment with himself; that on the 22d of February, 1847, in Mexico, the deceased came into his tent, and asked witness to take a walk; after walking some distance the deceased said, on to-morrow we should go into battle, and in the event he should fall he wished witness to bear home to his friends some relics, which he named. Witness asked him what disposition he had made of his property, to which he replied that he had given it to his niece, Martha Yarborough, which was known to his friends from his letters, and that he felt satisfied his wishes would be carried out. That a battle was fought the next day (February 23d) between the American and Mexican forces, at Buena Vista, in which Garland Anderson was killed. The deceased was mustered into service of the United States on the 15th of June, 1846, and continued in actual service until his death.

On this proof the judge of probate admitted the extracts of the letters, as quoted above, to probate, as the last will and testament of Garland Anderson; and granted letters of administion, *c. t. a.* to W. W. Cockrun.

In opposition to this grant of letters and probate, Henry W. Anderson, a brother of the deceased, for himself and the other brothers and sisters, and their descendants, appeared and read a letter to himself, from the deceased, dated at Monterey, September 29, 1846, in which he says: "Tell John not to be uneasy; every cent I have in the world is at his disposal. I tried to get a discharge, so that I could come and be with him at his trial, but did not succeed." The person referred to as "John" in this letter, was also a brother of deceased, who was in a lawsuit and difficulty, from having shot a negro, for which he had

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been tried and acquitted; and had been sued also in a civil suit, for his value.

Mrs. Nancy Anderson, the mother of the deceased, proved that shortly before her son's death he had written to her that if his brother John was still in his difficulties all his property was at his disposal. And in another letter, written early in January, 1847, he said, "never mind Martha; I will come after a while."

This was all the proof; the parties contesting the probate appealed.

D. C. Glenn, for appellant.

1. The will, in view of the conflict of testimony, should not have been probated; at one time the deceased undoubtedly intended his property for his niece; but at a later period the difficulties of his brother seemed to have changed that intention.

2. The will sought to be probated was not a valid will; the deceased had no lawful authority so to dispose of his property. It is no nuncupative will. How. & Hutch. ch. 36, § 6. It is a soldier's will, and is to be sustained under the act of March, 1833, which provides that a soldier may dispose of his chattels as he might heretofore have done. Ib. ch. 36, § 9. This was taken from the law of 1821, Rev. Code, p. 27, § 21; that, from the territorial act of March 12, 1803, revised February 10, 1806; Toulman's Dig. 275; Turner's Dig. 433, § 4. These give the power in the same words; the question is, how might he theretofore have done so? By act of Congress, sec. 3, 1798, and of May 10, 1803, sec. 1, the ordinance of 1787 was extended over this country. In that ordinance there is found no authority for a will like this. In the statutes of Georgia, is a provision like the one in ours; so in England, in the statute of 29 Charles II. the same language is used; but it is unexplained; no reported case touches it; it is not of common law origin, as the feudal system did not favor testaments. It is of civil law origin, interpolated by the ecclesiastics into the law of England; and the law of Justinian must indicate the mode in which the soldier's will is to be made. In Coop. Jus. lib. 2, § 16, p. 118 and notes, the

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law will be found; the soldier may only convey his military or *quasi* military property, but in no case his *peculium adventitium*, or *peculium profectitium;* his pay, his baggage, his haversack, and his canteen, are all he may dispose of. This is the civil law, the law of England, and the law of this state, on the subject.

McNutt and *Paxton*, on same side.

M. C. Watson, for appellee.

1. The statute of wills is not applicable to the will of a soldier in actual military service. See How. & Hutch. p. 387, sec. 9.

2. But this will is good, even under the statute. The letters which make the disposition of the property of decedent, are, throughout, in his handwriting. How. & Hutch. 385–6, § 2; Law and Practice of Probate Courts, by Chilton, pp. 467, §§ 9 and 10, and references; 6 Gill & John. Rep. 25, 27; 4 N. H. Rep. 434; 6 Humph. 452, and the references to Williams on Executors, there made.

Mr. Justice THACHER delivered the opinion of the court.

Garland Anderson, a volunteer from this state, in the service of the United States, was killed in the battle of the 23d day of February, 1847, at Buena Vista, Mexico. Previously to his death, three letters were received from him, written altogether by himself, in which he expressed a desire and intention that in the event of his death, his property, which consisted of slaves, should go to his niece, Martha Yarborough. These letters were presented for probate, as the last will of deceased. The application was opposed by his brothers and sisters. They exhibited letters, also, from the said Garland Anderson, in which he expressed his willingness to aid his brother, who was in difficulties, with all his property. The probate court received and admitted to probate, the said first-mentioned letters, as the last will and testament of the said Garland Anderson.

It was competent for the testator to make a will while abroad

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in Mexico, and the will was sufficient and legal under the statute. H. & H. 325, § 2; *Boyd et al.* v. *Boyd*, 6 Gill & John. 25.

The first-mentioned letters were clearly testamentary. They show the intention to make a bequest, and are valid as such. *Hunt* v. *Hunt*, 4 N. H. 434. Such was not the intention expressed in the other letters. They exhibit merely a promise to aid his brother, if in his power.

Decree affirmed.

TYREE J. SPAUN *vs.* WILLIAM Y. COLLINS.

On the death of a father without having appointed a testamentary guardian, his widow, under the statute, (H. & H. 336) has the first right to be guardian of the estate of his children; yet if the widow marry again, and her husband, who has taken out letters of guardianship, resign the trust, it will be regarded as a relinquishment of the right on her part; and the next of kin to the deceased, if qualified, and he apply, is next entitled to the letters.

In judging of the qualification of the applicant for guardianship, great discretion is necessarily allowed to the probate court; yet, if the next of kin be an applicant, and be admitted to be qualified, the court must prefer him to a stranger; and if letters of guardianship have been already granted to a stranger, though at the instance and on the petition of the husband of the mother, yet, on the application of the next of kin for the guardianship, it is the duty of the probate court to remove the stranger, and appoint the next of kin, where the children are under fourteen.

The appointment of guardians is a matter so peculiarly within the discretion of the probate court, that it will be difficult to interfere with its appointment.

ON appeal from the probate court of Carroll county; Hon. James S. Johnston, judge.

The facts will be found sufficiently stated in the opinion of the court.

Sheppard, for appellant.

William and *William G. Thompson*, for appellees.

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Mr. Chief Justice SHARKEY delivered the opinion of the court.

The appellant petitioned the probate court, to be appointed guardian of the minor children of his brother, Charles G. Spaun, deceased; and to have the appellee, who had been previously appointed, removed from his office.

The petition charges the appellee with a combination with the administrator, to defraud the heirs. It seems that one Hislep intermarried with the widow of C. G. Spaun, who was administratrix, and became administrator, in which capacity a decree for a large amount was entered against him, on his final settlement, in favor of the estate. Hislep was also guardian of the children, but resigned the trust, and, on his petition, Collins was appointed. After this, Hislep filed his bill in the district chancery court, to set aside the decree of the probate court, because it was made in his absence, and he was improperly charged, without an allowance of his proper credits. This bill Collins answered, in his capacity of guardian. The bill and answer are exhibits to the petition. This answer is made the ground of objections to Collins, as guardian.

The appointment of guardians is a matter so peculiarly within the jurisdiction of the probate court, to be determined by its discretion, that it must be difficult to interfere with its appointments. In this instance, both parties are conceded to be qualified. The answer to the chancery suit, filed by the appellee, is not free from objections, it concedes too much. But this was a matter for the exercise of the discretion of the judge of probate. It presents no such error in law as would justify us in reversing the judgment of the probate court. It appears that one of the children was over fourteen, and made choice of the appellee, and he was appointed guardian of the others on the petition of Hislep, the former guardian. Such a petition should have been entitled to but little weight, but this, too, was a matter within the discretion of the judge.

The only question of law in the case is this: has the appellant, who is the uncle of the children, a legal right to the office of guardian, in preference to the appellee, who is a stranger? The wife had the first right, but her husband resigned the trust,

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which must be regarded as a relinquishment on her part. The statute gives a preference to the natural guardian, or next of kin, if any such apply, unless such applicant be manifestly unsuitable to take the management of the person and estate of the orphan. H. & H. Dig. 336. Under this statute, the court has, of course, great latitude in deciding on the competency of the applicants. But when it is manifest that the next of kin is in all respects suitable to take the management of the person and estate of the orphan, he has a legal right to be preferred; and if the probate court may, under such circumstances, disregard his claims, the statute is a dead letter. In the absence of clear proof, we should not incline to interfere, because we should be bound to presume that the discretion of the probate court had been prudently exercised. But in this case, the uncle is admitted to be qualified, and we think he has a legal right to be preferred, so far as relates to the children who are under fourteen. Chilton's Probate Court Law, 481-2.

Decree reversed, and cause remanded.

THE STATE OF MISSISSIPPI *vs.* JAMES WOFFORD.

The vice-chancellor, created by the act of 1842, is constituted by the act a *conservator of the peace;* as such, he has power to commit all breakers of the peace, or to bind them in recognizances to keep it, or to answer for offences committed against it.

ON appeal, from the circuit court of Marshall county; Hon. Stephen Adams, judge, presiding.

In this case, a recognizance was taken by the vice-chancellor, conditioned, that James Wofford should appear at the next term of the circuit court of Marshall county, to answer a charge of stealing a slave. Wofford did not appear; judgment *nisi* was taken, and, on return of the *sci. fa.* the recognizance was quashed, on the motion of the sureties, on the ground that the vice-chan-

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cellor had no jurisdiction to take the recognizance, and the district attorney appealed.

John D. Freeman, attorney-general, for the state.

The law establishing the vice-chancery court, makes the vice-chancellor a *conservator of the peace.* As such, he is clearly authorized to take a recognizance in a criminal case, otherwise his authority to conserve the public peace would be inoperative.

Mr. Justice THACHER delivered the opinion of the court.

The single question presented in this case, is whether the vice-chancellor is authorized by law to take the recognizance of a person charged with a criminal offence. The act of the legislature, establishing an inferior court of chancery, in the northern part of the state, (Acts of 1842, ch. 3, § 3,) constitutes the vice-chancellor a conservator of the peace. This is but a legislative iteration of the constitution, which provides, that the judges of all the courts of the state shall, in virtue of their offices, be conservators of the peace. Const. art. 4, § 22. Within the duties and powers of general conservators of the peace, from the earliest periods, have been included the power to commit all breakers of the peace, or to bind them in recognizances to keep it, or to answer for offences committed against it.

The judgment of the court below must be reversed, the motion directed to be overruled, and the cause remanded.

RICHARD S. JONES ET AL. *vs.* DANIEL F. ALEXANDER.

The lien afforded by the statute of 1810, entitled, "an act to reduce into one the several acts and parts of acts for the benefit of mechanics," can only be claimed by those who bring themselves strictly within its provisions.

The statute provides that the suit must be brought within twelve months from the time the money was to be paid, in order to secure the lien; and if it be not brought within that period, it cannot prevail.

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Where, therefore, J. and others furnished lumber to A. for a house in the year 1844, the proper time for the payment of which was on the first day of January, 1845; and on the 6th day of May, 1845, A. executed his note for the amount due for the lumber, payable one day after date; and on the 7th day of April, 1846, J. and others filed their petition to enforce their lien on the house for the lumber sold, it was *held*, that the petition could not be maintained, not being brought within twelve months from the time the payment was to be made; the parties could not, subsequently to their original contract, change the time of payment fixed by that contract, and yet enforce the lien under the statute.

In error from the circuit court of Monroe county; Hon. Francis M. Rogers, judge.

Herbert, for plaintiff in error, cited the Acts of 1840, p. 58; 1 How. (Mi.) Rep. 24; 6 Ibid. 193; 1 S. & M. 660; Greenl. Evid. 315.

Reuben Davis, for defendant in error.

Mr. Justice Thacher delivered the opinion of the court.

This is an action instituted under the act of 1840, entitled, "an act to reduce into one the several acts and parts of acts for the benefit of mechanics." The suit was commenced by filing a petition and issuance of process on the 7th day of April, 1846. The petition sets forth that the plaintiffs furnished the defendant with lumber, at his request, in the year 1845, which was used by him in the construction of a certain building, erected on a described lot of land belonging to the defendant, the value of which lumber amounted to $341.65. The petition further sets forth, that in settlement of a portion of said sum of $341.65, the defendant made and delivered to the plaintiffs on the 6th day of May, 1845, his promissory note for the sum of $241.21, payable one day after date, and that the remainder of the sum of $341.65 was due for lumber furnished in 1845, but payable on the first day of January, 1846, for which an account is filed.

The answer to the petition denies that the plaintiffs furnished

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him lumber in 1845, which was used by him in the construction of the building aforesaid, but alleges that the lumber of which the house was constructed, was furnished in 1844, and was payable on the first day of January, 1845, and was settled by a cash payment, and the note described in the petition.

The proof, as to the above points made in the petition and answer, was that the lumber, of which the building was constructed, was furnished in 1844, except a quantity of the value of about one hundred dollars, furnished in 1845, a small portion of which was used in the building, and the remainder in the erection of a fence enclosing the building. It was also proved that the accounts for lumber furnished in 1844, were considered at the mill of the plaintiffs to be due on the first day of January, 1845. It was likewise proved, that the promissory note was given in payment of lumber furnished for the erection of the building.

At the trial, two instructions were refused by the circuit court which were asked by the plaintiffs, and several given for the defendant. These instructions had relation to what constituted the time of the payment for the lumber furnished for the erection of the building, and tended to instruct the jury that the maturity of that indebtedness occurred more than twelve months previously to the institution of the suit.

The lien appended by the statute to mechanics and others mentioned therein, gives them a preference over other creditors of a party, and, therefore, can only be claimed by those who bring themselves strictly within its provisions. Such statutory liens cannot be preserved if their beneficiaries deviate from the contract as originally made and secured by the statute. Parties will not be permitted to extend the time when the lien shall attach, and thus indefinitely postpone others less favored. Now the evidence in this case shows that the lumber, except a small amount furnished for the erection of the building, was delivered in 1844, and that the time of payment for it did not extend beyond the first day of January, 1845. If the answer may be deemed evidence, it shows that the note was given in payment of an account, the last item of which bears date in December,

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1844. It was proved that the note was given for the lumber, but it was also proved that the proper time for the payment of the lumber was at the expiration of the year 1844; and hence it follows that the plaintiffs, by taking the note, extended the time of payment beyond the time it should have been made, according to the original contract. The note is evidence of a time of payment, but not of the time of payment by the contract when the contrary is shown. As the case was presented by the evidence in the circuit court, the ruling of that court was correct.

Judgment affirmed.

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NOVEMBER TERM, 1846.

George W. Henderson *vs.* Barnabas Herrod.

The assignment of a note secured by a mortgage carries the mortgage with it, as an incident of the note, and subrogates the assignee to all the rights of the mortgagee; such assignee therefore requires no special authority from the mortgagee to resort to the mortgage; and if such special authority be given in writing by the mortgagee of a series of notes secured by the mortgage to the assignee of the first of the series, such assignee will have no better right than an assignee by mere indorsement of any other note of the series.

It is doubtful whether the mortgagee, who holds a series of notes secured by his mortgage, can change or modify the effect of the mortgage so as to give to his assignee of the first of the series of notes a right to prior satisfaction of such note out of the mortgaged property to the exclusion of the security from the other notes.

Where a mortgage was executed to secure three notes falling due at different periods each, and the mortgagee assigned each note for value to different persons, and all the notes had matured, it was *held*, on a bill filed by the holder of the first note of the series to foreclose the mortgage and subject the property to his note, that the holders of all the notes stood upon an equal footing and were each entitled to share ratably in the proceeds of the sale of the mortgaged property.

On appeal from the chancery side of the circuit court of Madison county; Hon. John H. Rollins, judge.

On the 4th of March, 1842, Barnabas Herrod filed his bill against George W. Henderson, S. D. Livingston, and A. G. Forney, in which he states that, on the 10th of December, 1839, S. D. Livingston executed his three notes to A. G. Forney, each for the sum of $3,333.33⅓; the first due 1st January, 1841, and the other two on the 1st of January, 1842 and 1843, respectively; and at the same time executed a mortgage, which was

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duly recorded, on certain real estate, to secure their payment. The mortgage was exhibited with the bill, was in the ordinary form, and did not stipulate that either of the notes should be entitled to priority of lien. On the 30th of December, 1839, Forney assigned the note first due, to Barnabas Herrod, and at the same time executed an instrument of writing, which, after reciting that Livingston had given his notes, secured by mortgage, proceeds as follows: "Now these presents serves to show, that I have this day assigned to Barnabas Herrod one of the above-mentioned notes, dated 10th day of December, 1839, payable on the 1st day of January, 1841, for the sum of three thousand three hundred and thirty-three dollars and thirty-three cents; and I wish it to be expressly understood that I do hereby authorize and empower the said Barnabas Herrod to use the aforesaid mortgage to aid him in the collection of the said note, which I have assigned to him, as fully as I could use it myself, had I not assigned it." This assignment was not recorded. On the 9th January, 1840, being indebted to Mortz & Henderson, Forney transferred to them, as collateral security, the remaining two notes secured by the mortgage. Livingston, the maker of the notes, was insolvent, and the notes unpaid. Herrod prays a decree of foreclosure and sale, appropriating the proceeds of the sale of the mortgaged premises in the first place to the payment of the note held by him.

Henderson, in his answer on behalf of the firm of Mortz & Henderson, sets out the demands of the firm against Forney; his transfer of the two notes to them, and insists that out of the proceeds of the mortgaged property an allowance *pro rata* should be made for the notes held by them. Forney being a non-resident was made a party by publication, and the bill is taken *pro confesso* as to him.

The cause was heard on bill, answer and exhibits. The court decreed a sale of the mortgaged premises, and directed the proceeds to be appropriated to the payment of the note held by Herrod.

Henderson sued out this writ of error.

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W. R. Hill, for plaintiff in error, cited 9 Cranch, 152–156; 2 Wheat. 380; 6 Monr. 192; 2 Burr. 979; *Green* v. *Hart*, 1 John. Rep. 580; 9 Cow. 747; 5 Ib. 202; *Parker* v. *Mercer*, 6 How. 320.

William Thompson, on same side.

W. Drane, for defendants in error.

Mr. Justice THACHER delivered the opinion of the court.

This was a bill to foreclose a mortgage. Livingston made his three promissory notes, each for $ 333.33⅓, payable at different periods to Forney. Before the maturity of the first note, Forney assigned it to the appellees, and at the same time executed an instrument in which he empowered the appellee to use the mortgage, by which the payment of the note was secured, to aid him in the collection thereof. This instrument was not recorded, nor does it appear that the appellants had notice of it. Also, before the maturity of the first note, Forney assigned two other notes, likewise secured by the same mortgage, to the appellants. The bill shows that the appellants obtained the notes assigned to them upon good and su cient consideration. The appellee below claimed a priority of payment from the proceeds of the sale of the mortgaged premises, and the appellants claimed a ratable division. The cause did not come up for hearing below until such a time as all the notes had matured. The court below decreed, appropriating the proceeds of the sale to the payment of the note first falling due until satisfied.

The assignment of a note secured by a mortgage carries the mortgage with it as an incident of the note, and subrogates the assignee to all the rights of the mortgagee. There is nothing in the special assignment that accompanied the first note which gives that note any preference over its fellows in the mortgage, it merely does in effect what would result by operation of law upon the assignment of the note. Indeed, it is questionable

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whether the mortgagee could change or modify the effect of the mortgage and exclude the security from the two last notes. The holders of the three notes stood therefore upon an equal footing, being entitled to share in the division of the proceeds of the sale ratably, and so the court below should have decreed. *Parker* v. *Mercer*, 6 How. 320; 5 S. & M. 410.

Decree reversed, and a decree directed to be entered up here in accordance herewith.

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NOTE.

The argument of Judge Clayton, referred to in the note on page 189, as having been submitted to the Chancellor in the case of *Parker* v. *Kelly et al.*, *supra*, and which it was there stated would be published as an Appendix to this volume, was forwarded for that purpose to the publishers; but upon subsequent consultation with its author and in view of the peremptory provisions of the act of the legislature of 1846, it has been withdrawn from the publishers' hands.

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INDEX.

AMENDMENT.

1. Under the act of 1840 (Sheet Acts, p. 133,) to regulate the practice of the circuit courts, which provides, "that if it be discovered that the pleadings are defective, it shall be the duty of the court, and the judge holding the same, is hereby required to cause the same to be amended and perfected, so that the merits of the controversy shall be fairly put to the jury," it is no longer in the discretion of the circuit courts to grant amendments, but it is matter of obligation and of right. *Deut* v. *Coleman*, 83.
2. Therefore, where the plaintiff in an action filed a replication to the plea of the defendant, and the court below thought the replication bad, it was held by this court, that instead of turning the plaintiff out of court, the judge should have caused an amendment to be made, suited to his views of the law, and thus have secured a trial on the merits. *Ib.*
3. The statute of 1840 (p. 133 of Sheet Acts) is imperative, that it shall be the duty of the judge, and *he is thereby required* to allow amendments to be made, if desired; and if the circuit court, on the application of a plaintiff to amend his replication, which has been held bad on demurrer, refuse to permit the amendment to be made, the high court of errors and appeals will reverse the judgment, that the amendment may be allowed.

   Wharton v. *Porter*, 305.
4. Where on demurrer to a replication in the court below, the replication is pronounced bad, and the plaintiff does not ask to amend, or plead over, and it appears from the plea pleaded and the replication, that not only the form but the substance of the latter was defective, and that the defect in the substance could not be supplied by any change in the form of the pleadings; the high court of errors and appeals would not reverse the judgment in order to allow an amendment in the court below, that the case might be tried on its merits. *Agnew* v. *McElroy*, 552.

APPEARANCE.

See *Plea. Practice.*

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ASSIGNMENT BY BANKS.

See *Banks.*

ASSIGNOR AND ASSIGNEE.

A release by an assignor of his assignee's claim, is a nullity.
Parker v. *Kelly*, 184.

ATTACHMENT.

1. Where the affidavit to obtain an attachment stated the debt to be a certain sum, and the bond was in double that sum, it was *held* sufficient to uphold the attachment, notwithstanding the condition of the bond recited the debt claimed at ten dollars more than the affidavit. The recital in the latter must prevail. *Lawrence* v. *Featherston*, 345.

2. The statute (H. & H. 556, § 35,) which authorizes constables to execute attachments against *absconding debtors*, is enabling in its character; and does not embrace the case of *non-resident* debtors; constables, therefore, cannot execute attachments returnable into the circuit courts against *non-residents*. *Ib.*

3. A bond, therefore, taken by a constable from a non-resident to replevy property attached, is not binding, because taken by an improper officer; and should with the levy be quashed on motion. *Ib.*

4. Where, however, the attachment bond, affidavit and writ are regular, but the latter is served by an improper officer, it will be improper on that account to quash the entire attachment; the levy and return on the writ should be quashed; and where the defendant has entered his appearance, the court should require him to plead to the action. *Ib.*

5. An affidavit for an attachment under the law of 1844, which stated that the debtors "are about removing from the state, or are so concealing their effects as to defeat the creditor's claim," is sufficient to uphold the attachment; the verb '*removing*,' according to the true grammatical construction of the sentence, having relation to '*the effects*' and not to the persons of the debtor; and even if it related to the *persons*, it seems the affidavit would not be vitiated by having more in it than was sufficient.
Commercial Bank of Manchester v. *Ullman*, 411.

6. The affidavit in an attachment, stated that Ullman and Hausman were indebted, &c.; the bond recited that Ullman and H. Hausman were indebted, &c., and the declaration declared against Henry Ullman and William H. Hausman; it was *held*, that the variance was immaterial. *Ib.*

7. The defendant in an attachment has no right, by plea in abatement, or otherwise, to contest the truth of the fact alleged as the ground of the attachment, where the affidavit and the proceedings appear on their face to be regular and sufficient; upon the performance of certain requisitions the

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statute gives the writ; if wrongfully sued out the defendant has his remedy on the bond; the truth of the affidavit is not traversable.

Smith v. *Herring*, 518.

ATTACHMENT IN CHANCERY.

See *Chancery*.

ATTORNEY AT LAW.

1. The general doctrine that an attorney may submit a matter in dispute to arbitration, is limited to the case where there is a cause pending which he has been employed to manage. *Jenkins* v. *Gillespie*, 31.

2. Therefore where W. J. and N. J. and G. signed a written agreement to submit a matter in controversy between them to the arbitrament of seven persons, and afterwards it was agreed in writing, signed only by W. J. and G., that five persons should act instead of seven, a majority of whom should be authorized to make the award, and accordingly an award was made by them, two dissenting; it was *held*, that N. J., who was not a party to this agreement, but whose attorney at law assented to it, without express authority so to do, was not bound by the award. *Ib.*

3. Even admitting that an attorney has, in general, power to submit the cause of his client to arbitration, yet it seems he has no power to change the terms of submission made by the parties, where it does not appear, whether he was employed before or after the submission; nor to what extent his authority went. *Ib.*

4. The general authority of an attorney at law, as such, does not extend so far as to enable him to release property levied on, under execution; and it seems, therefore, that if an attorney at law release a levy upon personal property, such levy and release will not be a satisfaction of the judgment, nor a postponement of its lien. *Banks* v. *Evans*, 35.

5. Whether an attorney at law, who receives a commission upon the sum he may collect in a pending suit, is a competent witness for his client in that suit, or not; yet, if an attorney be offered as a witness for his client, the record must show *affirmatively* that he *is* to receive such commission, before the high court of errors and appeals can pass upon his competency.

Arthur v. *Mitchell*, 326.

6. Where an attorney, having in hands a note for collection, receives from the maker a certain sum, which, upon the trial of a suit upon the note, the maker seeks to have credited on the note, the attorney is a competent witness for his client in the case, because his interest is balanced, he being liable either to plaintiff or defendant, according to his testimony. *Ib.*

7. An attorney at law, as such, has not power to grant a stay of execution to the principal defendant, that will discharge a surety; unless he have express authority so to do from his client, a stay of execution by him will not be binding. *Union Bank of Tennessee* v. *Govan*, 333.

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BAILMENT.

1. Where goods are shipped on board of a steamboat, and a bill of lading taken by the shipper, and delivered to the boat for the consignee, the title to the goods is not thereby necessarily vested in the consignee absolutely; it depends on the intention of the parties; if made for the purpose of passing title, the delivery of the bill of lading will have that effect; if there be no contract of purchase between consignor and consignee or other party, the owner's title will not be divested. *Bonner* v. *Marsh*, 376.

2. When goods are consigned by one to another, there is a difference between the right to the goods and the right to the proceeds; there is no change of property in the latter case; where the consignee is merely interested in the proceeds, the right remains in the consignor. *Ib.*

3. There are cases in which the consignee will, for a preëxisting debt, be allowed to retain in preference to other creditors out of the goods consigned, when they have come *into his actual possession;* but until the goods are in his actual possession, (a constructive possession will not do,) the consignee, though a creditor, has no interest in the goods beyond his commissions, and can assert no right to have satisfaction of his debt out of the consigned goods; and if they are seized by an attaching creditor of the consignor before they reach the consignee, the latter has no longer any right to or interest in them. *Ib.*

4. M. being a resident of Louisiana, in debt to B., of New Orleans, in that state, shipped to B., by steamboat, eleven bales of cotton, took a bill of lading for them and delivered it to the boat for B.; the cotton being shipped by M. to B. to sell, and out of the proceeds B.'s account was to be paid, and any other account or note M. might owe B., or bill, he might draw on B. against the cotton; while the boat was on the voyage to New Orleans with the cotton it stopped at Natchez, in the state of Mississippi, where P., a creditor of M., attached the cotton thus shipped to B.; the latter claimed the cotton, and on an issue to try the right of property, *held*, that under the facts the cotton was M.'s when attached, and was subject to the attaching creditor in this state. *Ib.*

BANKRUPT.

1. An attachment was sued out at law against non-residents, and a garnishee summoned to answer, on the 15th of March, 1842. He answered, that he was the administrator of an insolvent estate that would owe something to the defendants in the attachment, but that they had filed their petition in bankruptcy under the act of congress, on the 10th day of March, 1842, and had been declared bankrupts on the 6th day of April of that year; on this answer the court below discharged the garnishee. *Held*, that it was erroneously done; that the lien attached in favor of the attaching creditor, from the time

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of the service of the process of garnishment, and could not be defeated by the declaration of bankruptcy made afterwards. *Wells* v. *Brander*, 348.

2. The mere declaration of bankruptcy is but an incipient step in the proceeding for a final decree, and is not evidence of the transfer of all the applicant's effects under the act of congress. *Ib.*

See *Record*; how certificate must be certified.

BANKS.

1. Where the payee of a note executed to him for value, has procured its discount by a bank in this state, and, after its maturity, since the law of 1840, prohibiting assignments by banks of their evidences of debt, the payee on default of the makers, has paid the amount of the note to the bank, and received the note back again from the bank, the payee is remitted to his original rights against the makers of the note, and the law of 1840, referred to, has no application to the case. *Wade* v. *Thrasher*, 358.

2. The first and fourth sections of the act of 1842, (Sheet Acts, p. 140,) in relation to the practice in writs of garnishment, embrace all debtors as well as the debtors of banks; the second and third sections apply exclusively to bank debtors. *O'Brien* v. *Liddell*, 371.

3. Where the act of incorporation of a bank, reserved to the legislature a right to repeal the charter to a limited extent, leaving power to the bank to wind up its affairs, it was *held*, that the right to proceed against the bank by *quo warranto*, was not, if the legislature did not enforce its right under the charter, in any way impaired. *Grand Gulf Bank* v. *The State*, 428.

4. Under the construction of the act of 1840, prohibiting assignments by banks of their evidences of debt, placed upon it by the high court of errors and appeals of this state, a general assignment to trustees for the benefit of creditors, made by a bank, of its property and effects, since the law of 1840 referred to, would be void; yet, as the supreme court of the United States has reversed the decisions of the former court, and has given a construction to that act different from that given by the court of this state, the court of this state feels bound to conform to the decision, rendered on direct appeal, of the supreme court of the United States, and will hold such assignments *valid*. *Ib.*

5. Therefore, where a bank, since the act of 1840, referred to, had made a general assignment of its property and choses in action to assignees for the benefit of its creditors, and, subsequently, proceedings, under the *quo warranto* act of 1843, were had against the bank, and a judgment of forfeiture rendered, and trustees appointed under the law, it was *held*, that the latter could take only what did not pass by the deed of assignment. *Ib.*

6. Where a charter of a company provides for the forfeiture and sale of stock, on failure of the stockholder to pay, such remedy is merely cumulative. The company may also sue the delinquent stockholder at law.

Freeman v. *Winchester*, 577.

See *Executor and Administrator*; decree to pay money is to pay *in specie* and not in bank notes.

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BANK NOTES.

See *Executor and Administrator;* liability of, for collecting bank notes, and when they may do so.

BILL OF EXCEPTIONS.

1. The recital in the body of a bill of exceptions must prevail over any memorandums on the margin. *Keithler* v. *The State*, 192.

2. Where, in a bill of exceptions, taken in an action on a bond, to the admissibility of the bond in evidence, under the plea of *non est factum*, it is recited that the *signature* of the obligor was proved, and the bond recites that it was "*sealed*," and opposite the name of the obligor, in the copy of the bond in the bill of exceptions, is written the word "*seal;*" *held*, that there was nothing in the bill of exceptions that showed that the bond was not actually sealed, or that a substitute for a seal was employed. *Hines* v. *The State of North Carolina*, 529.

3. Where a bill of exceptions is imperfect in not setting out all the testimony with reference to the execution of a bond, whose admission in testimony is complained of, the high court of errors and appeals will presume that the court below properly admitted it on due proof of its execution. *Ib.*

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. An indorser of a note, who has received indemnity against the indorsement by deed of trust from the maker, cannot proceed to subject the property conveyed, to the payment of the debt, until he has paid the note and taken a reassignment of it. *Lewis* v. *Starke*, 120.

2. Where a deed of trust is given by the maker of a note to indemnify his accommodation indorser from loss by reason thereof, the holder of the note thus secured cannot enforce the deed of trust directly; he can only do so by a bill in chancery to have the benefit of the deed in his behalf; and if he do not choose to file such bill, a court of chancery will not force it on him. *Ib.*

3. Bills and notes lose their negotiable character after payment, as between the original parties; but a party who indorses a note or bill after payment, knowingly, binds himself; and the indorsee may recover of him the amount of the note. *Mabry* v. *Matheny*, 323.

4. Where a party to a negotiable paper, before its maturity, has changed his residence, and *his removal is known*, notice should be sent to him at his new place of domicil, if known, or if by reasonable diligence and inquiry it can be ascertained; but this rule presupposes *knowledge* of the removal; without such knowledge, notice, it seems, to the former place of residence will be sufficient. *Union Bank of Tennessee* v. *Govan*, 333.

5. Where, therefore, P., residing in Somerville, Tennessee, a distance of two hundred miles from Nashville, indorsed a note for G., also a resident of

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Somerville, to be discounted by a bank in Nashville, and that bank discounted the note, knowing the *then* residence of the parties, and, afterwards, at its maturity, G. paid part of the note, and renewed the residue by executing a new note, with P. as indorser, falling due at a subsequent period; shortly before the execution of which last note, P. had removed to Mississippi, but the knowledge of the removal was not brought home to the bank, it was *held*, that notice of protest of the second note sent by the bank to P., at Somerville, Tennessee, was sufficient; it would have been otherwise, if knowledge of the removal had been brought home to the bank. *Ib.*

6. It seems that where, after a note has been protested for non-payment, the indorser executes a deed of trust to secure its payment, it would furnish strong presumption that notice had been received, or else waived by the subsequent agreement. *Ib.*

7. Where the makers of a note, payable, for value received, to the payee, pay a portion of the note to the assignee for value, of the payee, and execute a new note for the residue, payable to the payee of the first, who, by the contract of renewal, is to and does indorse it to the assignee, the payee, who is thus indorser on the second note, is not the *accommodation indorser* of the makers; the contract of renewal is a mere continuation of the previous liability, changed in nothing but amount; and when the payee has been compelled to take up the second note, the rights of the parties will stand as they would have stood, if the plaintiff had taken up the original note instead of the new one. *Wade* v. *Thrasher*, 358.

8. Where the payee of a note executed to him for value, has procured its discount by a bank in this state, and after its maturity, since the law of 1840, prohibiting assignments by banks of their evidences of debt, the payee on default of the makers has paid the amount of the note to the bank and received the note back again from the bank, the payee is remitted to his original rights against the makers of the note and the law of 1840, referred to, has no application to the case. *Ib.*

9. Where the payee of a note, made to him for value, assigns it for value to a third person, and the makers fail to pay it at maturity, and the payee takes it up from his assignee, it is immaterial what the payee pays to the assignee to regain the note, he is restored to all his rights as against the makers, and can recover the full value of the note from them. *Ib.*

10. A note for a sum certain, payable at a day certain, in cotton at a fixed price, becomes absolute for the payment of money upon the failure to deliver the cotton at the day; such a note is different from one payable in bank notes. *Hardeman* v. *Cowan*, 486.

11. Where a suit was instituted against the maker and indorsers of a note, and, at one term of the court, previous to the trial, verdict and final judgment in the case were rendered, an order of continuance as to one of the indorsers, and of final judgment as to the other parties was made, to which no objection at the time was taken; but, subsequently, when the cause came on for trial, the

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suit was dismissed as to those against whom the final judgment had been previously taken, and a verdict and judgment rendered against the indorser alone, as to whom the continuance was entered; no bill of exceptions being taken to the trial and judgment against the indorser; it was *held*, that the verdict and judgment against the indorser were properly taken, and should not be set aside. *Hunt* v. *Nugent*, 541.

12. Whether, if the declaration aver that due legal notice of protest was given, it will be sustained by proof, that diligent search was made in order to ascertain the indorser's residence, but in vain;—*Quære*. *Ib.*

13. A note, dated January 1, 1837, at Cayuga, in Hinds county, fell due February 1, 1838, at the Grand Gulf Bank, at Grand Gulf, Claiborne county; it was protested for non-payment at maturity, and suit brought upon it against the indorser; on the trial, it was proved, that in January, 1838, the indorser had *removed* to a place in Hinds county, two miles and a half from Utica post-office in that county, and six miles from Cayuga; there was no evidence of the previous place of residence of the indorser; the notary, who protested the note, inquired of the officer of the bank where it was payable, to what point he must direct notice, and was informed to Cayuga, and he accordingly did so: *Held*, the notice was sufficient to bind the indorser. *Ib.*

14. In every action at law, the plaintiff must show a legal title to the instrument sued on; and if he have none, he cannot recover on the instrument, although the defendant may have promised him to pay it.

Beard v. *Griffin*, 586.

15. B. executed his bond payable to A., who died the holder of the bond; on his death, C., who had been book-keeper of A., sold the bond without indorsement to T., to whom, while holder, B. promised, in the presence of G., to pay it; upon which, G. obtained it from T., and brought suit against B. upon it, in one count of the declaration alleging this promise by B.; the latter plead want of title in G. to the bond: *Held*, that the facts sustained the plea; the legal title was in the administrator of A., who alone could sue on the bond; the promise of B. was a waiver of defence to the bond in the hands of a legal holder; but did not dispense with proof of title in the holder. *Ib.*

16. On the trial of a suit upon a note, the maker offered to prove that he signed the note in blank as a surety, with an express agreement that it was to be made payable to a bank in renewal of notes previously executed by him as surety for the same party, and that it had been filled up payable to a different person, and used for a different purpose; *held*, that the testimony without other proof, that the payee took the note with knowledge of the purpose for which it was executed, was irrelevant and inadmissible.

Torrey v. *Fisk*, 590.

17. Whether the principal in a note is a competent witness for the surety in an action on the note against the latter, to prove that the note was signed by the surety in blank for one purpose, and used for a different,—*Quære*. *Ib.*

See *Usury*. See *Evidence*, for when party to note is competent witness.

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BILL OF INTERPLEADER.

1. A bill of interpleader cannot be maintained by any person who does not admit a right in two claimants, and also show two claimants in existence capable of interpleading; in every case of interpleader, the case tendered ought to be of such a character that the whole of the right claimed by the defendant may be properly determined by litigation between them, and the plaintiff be under liability to neither beyond that which arises to the title of the thing in contest. *Browning* v. *Watkins*, 482.
2. The complainant, in a bill of interpleader, cannot, after the filing of the bill, set up a right in himself to the fund in controversy; by his bill he admits he has no interest in the fund, and leaves it to the defendants to adjust their conflicting claims. *Anderson* v. *Wilkinson*, 601.
3. When the complainant, in a bill of interpleader, has brought the fund in controversy into court, with interest up to the time of filing his bill; and after filing his bill the complainant sets up a claim, as a creditor of one of the defendants, to the fund, and the claim is adjudged to the other defendant, the complainant will not be chargeable with any interest from the time he brought the money into court. *Ib.*

BOARD OF POLICE.

1. The constitution of this state, which (Art. 4, § 20) gives to the boards of police, "full jurisdiction over roads, highways, ferries, and bridges, and all other matters of county police," does not, under the clause, "*matters of county police*," confer the right on boards of police to locate the seats of justice in their respective counties. *Monet* v. *Jones*, 237.
2. The term, "*county police*," in this clause of the constitution, has but little meaning in itself; and, in order properly to define it, legislation is necessary; the term is inoperative, until legislation designates its subject-matter. *Ib.*

CHANCERY.

1. It seems that a court of chancery has jurisdiction of a bill to have a deed cancelled, which is alleged to constitute a cloud upon the complainant's title; as where two persons have each purchased the same lands under judgments against the same defendant, and have received deeds respectively thereto, one of them may file a bill to cancel the deed of the other, on the ground that he has the better title; in such case the complainant must, in order to prevail, establish clearly the facts which annul the purchase of the defendant; the court will not, upon a doubtful state of case, set aside a legal title. *Banks* v. *Evans*, 35.
2. Where a bill in chancery was filed by A. & B. & C. to rescind a sale of land made by A. & B. to H. & T., and the bill averred that A. & B. held the land in fee for the use and benefit of C., and one of the defendants to the

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bill called for proof of its allegations, and H., whose evidence was taken, in answer to the question whether he and T. had not bought the land of A. & B., *trustees* of C., replied that he had; it was *held* sufficient proof of C.'s interest. *Taylor* v. *Strong*, 63.

3. Where, after the rendition of a judgment against T. & H. in favor of K., T. obtained a deed in fee simple to a piece of land from A. & B., with the understanding, at the time, that one G. should join T. & H. in the obligation to A. & B. for the purchase-money, which G. never did; and the execution of K. was levied on this land; it was *held*, that the sale to T. having been made on a condition never fulfilled, should be annulled, and the title revested in A. & B., and that it was not a proper decree to order a sale of the land to enforce the vendor's lien. *Ib.*

4. Where an execution is levied on property, subject to an older deed of trust, in favor of other parties, it seems doubtful whether the court of chancery has jurisdiction to interfere in behalf of the beneficiary under the deed of trust, by injunction against the sale under the execution. *Byrne* v. *Anderson*, 81.

5. Yet where such injunction is granted in the court below, and the question of jurisdiction not raised by demurrer in that court, the high court of errors and appeals will not throw any obstacle in the way of the relief sought. *Ib.*

6. A. and others filed their bill, alleging that they held a deed of trust on certain slaves of P., to secure the payment of a debt due to them; and that B. having a junior judgment against P., had levied an execution on the slaves; B. in his answer, set up that P. had made the complainants various payments, and but little was due on the deed of trust; the court below made the injunction perpetual, and ordered the slaves to be delivered to the trustees: *Held* by this court, that all the matters in controversy should be adjusted in this suit, and that the proper decree would be, for an account to be taken in the court below of what was due complainants; and a sale under the deed of trust ordered to pay what was thus found due, and the injunction against the execution at law made perpetual as to the property sold to pay the debt due to complainants; and the residue of the property levied on, if any remain, to be subjected to sale under the execution. *Ib.*

7. Where there was a complete defence at law, which by the use of ordinary diligence and precaution might have been there made available, the court of chancery will not interfere to grant relief. *Semple* v. *McGatagan*, 98.

8. Where, therefore, the defendants in a judgment at law, sought relief in equity against the judgment, on the ground that it was based on a contract with the plaintiff to pay him the sum sued for, for his services as teacher, with the understanding, that what he received from day scholars was to be deducted from the amount they were to pay; and that they had not been able until after the judgment at law to find the list of scholars who had paid, but they had since found it, and the sum received on it, *exceeded* the debt they were to pay; it was *held*, that they were not entitled to any relief against the judgment. *Ib.*

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9. A decree dismissing a bill which shows no ground of relief, is not erroneous, though it be rendered before the principal defendant has answered, or any steps taken against him. *Ib.*

10. Where the maker of a promissory note has a good defence at law, such as failure of consideration or payment, and fails to avail himself of it there, he cannot afterwards come into a court of equity for relief, without showing substantial reasons for not having made the defence at law.

Williams v. *Jones*, 108.

11. Therefore, where W. being sued at law on a note in favor of J., payable at a particular time, allowed judgment to go against him at law, and subsequently filed a bill in equity against J., alleging that the note was given for a tract of land bought of J.; which tract had been appraised for the purpose of procuring stock in the Mississippi Union Bank, and that the terms of the contract of sale were, that the purchase-money was to be paid by W. out of the proceeds of the certificates of stock when discounted and in Union Bank money; and W. exhibited with his bill a contract to that effect between himself and J.; it was *held*, that W. had a complete defence which he should have made at law; and J. having denied the contract of sale in her answer, as set up by W. and sworn that she had been deceived and imposed on by W. in the execution of the contract, as no such conditions were read to her and her answer being sustained by proof; it was *held*, W's. bill was properly dismissed *Ib.*

12. Whether, where a forthcoming bond has been given and forfeited, a court of equity has jurisdiction to go behind the judgment of forfeiture, and inquire into the validity of the levy of the execution on which the bond was given, — *Quære.* *Baine* v. *Williams*, 113.

13. A subsequent purchaser has a right in equity to require an execution creditor to exhaust the unsold property of his debtor, before he resorts to that which has been sold; so, also, it seems, that one holding an incumbrance on property junior in date to a judgment lien, can force the judgment creditor to exhaust the other property of his debtor before he can sell the incumbered estate; but if the junior incumbrancer permit a sale to take place of the property on which he has a lien, under the judgment, his remedy is at an end; for though the sale might have been *prevented*, it will not be set aside. *Ib.*

14. An execution having been levied on certain lands, a junior incumbrancer filed his bill, to compel the judgment creditor to levy on other property of the judgment debtor; the chancellor decided against his right to do so, and he prayed and appealed; but before prosecuting his appeal, the property was sold under the execution; he moved this court to have the sale set aside; *held*, that although he was entitled to the relief originally prayed for, yet, as by his neglect in prosecuting his appeal, he had permitted the sale to take place, it was too late to afford him relief, and the sale could not be set aside. *Ib.*

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15. The court of chancery does not possess jurisdiction, at the instance of the creditor of a deceased person, to compel persons who have been at different times his administrators, to file an inventory of the assets of his estate, and to account fully for their actings and doings in their respective administrations, and to pay the complainant's debt; and if there be not assets for that purpose, that the administrator of one of the sureties on the administration bond of the administrator may be compelled to pay it. The settlement of the different administrations was for the probate court; and if liability on the administration bond is to be enforced, it must be through the circuit court. *Green* v. *Creighton*, 159.

16. Where a fraud is practised by an administrator, in his settlement in the probate court, a court of equity, on a bill filed for that purpose, will set aside the settlement and direct a new settlement in the probate court; the jurisdiction of the court of chancery extends no further. *Ib.*

17. Where an administrator's settlement in the probate court is impeached as fraudulent, by bill in chancery, and no proof is offered to sustain the allegation of fraud, which the answer denies, and no proof offered to show that the settlement was made without the notice required by the statute, it will not be disturbed. *Ib.*

18. A court of equity has jurisdiction to enjoin a sale under execution at law, on the application of an equitable incumbrancer, who has a prior equitable lien, to the lien of the judgment; and when the court has taken cognizance of the matter, it will adjust all the rights of the parties.

Parker v. *Kelly*, 184.

19. Where, therefore, a vendor had given a bond for title, and assigned one of the vendee's notes for the purchase-money, and then made the vendee a deed; and afterwards a judgment had been rendered against the vendee, and the land was about to be sold under execution thereon; it was *held*, that a court of equity had jurisdiction at the suit of the assignee to enjoin the sale under the execution, and to adjust all the rights of the parties, by decreeing satisfaction out of the land, first to the assignee, and afterwards to the judgment creditor. *Ib.*

20. The rule that holds a party to strict vigilance, when he resorts to equity for relief against a judgment at law, the defence to which was purely legal, is fully complied with in a case where the party seeking relief against a sale of property claimed by him, shows that the sale was made under a judgment to which he was not a party, which judgment, he alleges, was obtained by fraud, of which fact he had no knowledge at the time his property was held subject to an execution on it; the plaintiff in which judgment, was a non-resident, who had lately changed his residence, and had no interest in, or knowledge of, the fraudulent judgment rendered in his name, and the party seeking the relief had no knowledge of these facts, until he filed his bill.

Humphries v. *Bartee*, 282.

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21. Where one is about to be affected by a judgment to which he is not a party, his proper remedy for avoiding it is in chancery; he may there show, that the judgment was recovered by fraud. *Ib.*

22. No relief can be had against a void contract, when a judgment has been rendered thereon at law, where the defence ought to have been made; you cannot go behind the judgment; it is otherwise however, if *the judgment itself* be void for fraud in its rendition. *Ib.*

23. Nor can a judgment, void for fraud, on which an execution has been issued and levied, and the property levied on, claimed by a third party, and, on a trial of the right, declared subject thereto, be made valid by the failure of the claimant at the time he set up the void character of the judgment; the rule which holds the party to vigilance in making his defence at law, does not apply to such a case; for want of vigilance on his part, could not make the void judgment valid. *Ib.*

24. Where slaves were conveyed by an absolute bill of sale to the vendee, but in reality, merely as a mortgage, to secure a debt due by the vendor, and judgments are subsequently rendered against the vendor, and the vendee seeks relief in equity against executions on these judgments, the proper remedy is, to decree a sale of the slaves, and order the proceeds to be appropriated first to the satisfaction of the mortgage-money, the amount of which is to be ascertained by an account; and, second, to the payment of the judgments, in the order of their priority, excluding such judgments as are not recorded in the proper county, according to the statute; if he desire it, the vendee may redeem from judgment creditors of the vendor. *Ib.*

25. Where a trustee is seeking, by bill in equity, possession merely of the trust-property, it is not necessary for him to bring before the court the other parties interested in the trust, but who had nothing to do with the question of possession. *Ferguson* v. *Applenhite*, 301.

26. A. alleged in his bill that J. executed a deed of gift of certain slaves to A. as trustee for the children of A.'s two daughters, M. and N.; the slaves to be held by A. for the benefit of M. and N., until their youngest children arrived at age, and then the slaves were to be equally divided among all the children. M. married F., who took the slaves into possession; M. died leaving four minor children; N. was living, with minor children; F. refused to deliver the slaves to A; and the bill was filed to recover them. F. was the only party defendant to the bill, and he demurred for want of parties; the court below overruled the demurrer, and the high court affirmed the judgment. *Ib.*

27. The remedy to enforce the right of creditors to pursue the estate of the testator in the hands of legatees, after the executor or administrator has assented to the legacies, is in equity to compel them to refund.

Turner v. *Chambers*, 308.

28. B. purchased a slave of W. in February, 1843, and gave W. $350 for him, and agreed to permit W. to redeem the slave either in September or Novem-

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ber following, by paying $400: W. failed to redeem at the time and B. gave him $150 dollars more and took a bill of sale from W. at which time B. gave W. also the privilege of redeeming the slave if he could sell him for more money; W. on the same day sold the slave for $25 more to L. B., and B. gave W. the bill of sale he had received; and L. B. paid the money in part to B. and part to W. who paid the rest to B., and W. gave L. B. a bill of sale of the slave; G. obtained judgment against W. after the time limited for redeeming and before the payment by B. to W. of the one hundred and fifty dollars on the sale to L. B.; W. up to the time of sale to L. B. had retained possession of the slave; G. levied an execution on his judgment on the slave in the hands of L. B. which the latter enjoined: *Held* by a majority of the court, that the title to the slave was vested in B. by the sale of February, 1843, and that his permission to W. to redeem was merely *ex gratia;* and his payment of the $150, a gratuity; and the formalities observed respecting the return of the bill of sale and the execution of the bill of sale by W. to B. amounted to nothing in a case of bargain, sale and delivery of personal property. *Goodman* v. *Burford*, 385.

29. *Held*, also, that even if the agreement to redeem had formed a part of the contract of first purchase, and had actually existed even up to the date of G.'s judgment, the lien of the judgment existed only upon the mere contingency or privilege which W. failed to avail himself of; and that the injunction against the judgment at law was properly perpetuated. *Ib.*

30. Before an equitable mortgage will be sustained in equity, there must be clear and unequivocal proof of the intention to create the mortgage, and the sum which the mortgage is to secure. *Williams* v. *Stratton*, 418.

31. A decree of the chancery court, in relation to the realty of minors, which contains no saving clause as to their rights on arrival at age, is erroneous; but the decree being regular in other particulars, the high court of errors and appeals will protect the minors' rights by decree in that court. *Ib.*

32. It seems, that where certain persons, claiming property in their own right, are decreed to be trustees of the legal title for the use of others, the decree should require the former to make conveyance of that title to the latter; and is defective in not doing so, but will not be reversed therefor at the instance of those holding such legal title. *Ib.*

33. Where there is no general personal representative, a special administration limited to the subject of the suit is generally required in equity.
Browning v. *Watkins*, 432.

34. H. brought suit against F. on a note; F. being doubtful of the ownership of the note, whether it belonged to H., or W., deceased, filed his bill of interpleader against H. and the heirs of W. (there being no administration on W.'s estate,) and brought the money into court. H. and the heirs of W. answered, the former insisting also on a demurrer; the vice-chancellor, on the proof, awarded the money to W.'s heirs: *Held*, that it was not a case for a bill of interpleader; the heirs were not in a condition to assert a claim

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against H., and therefore there were not *two claimants* of the thing in controversy; administration ought to have been taken out on W.'s estate, and his administrator conducted the litigation in that behalf. *Ib.*

35. Where a judgment at law has been obtained against a person, he cannot obtain relief in equity against the same, on the mere allegation that the grounds of defence were not known to him at the time of the trial at law, admitting that defence to have been a good one; he must also show that he used ordinary diligence to discover them, or that they could not have been procured by such use. *Meek* v. *Howard*, 502.

36. A surety on a bill single, against whom a judgment at law had been rendered by default, filed his bill for relief against the judgment, on the ground that previous to the judgment the holder of the bill had given time to the principal debtor, and the bill alleging further, that the complainant was not advised, at the time, of any legal defence at law, that he could plead in bar of the suit; but the pleadings did not aver, nor did the proof show, that he sought information of the principal as to the delay in bringing the suit, or used any diligence or precaution to ascertain whether any defence existed at law; *Held*, that a court of equity could give no relief against the judgment; and that, in fact, the true construction of the language of the bill as to the reason for not making the defence at law, was not that the complainant was ignorant of the *facts*, but of their *legal effect*. *Ib.*

37. A sheriff sold property of J. under three executions against him; it was bought by H., who did not pay the purchase-money; the sheriff sued him, and recovered a judgment against him therefor, which H. sought to enjoin on the ground, that he had become a judgment creditor of J. of older date than two of the executions under which he bought, and that as the sheriff had not paid the amount of their bid over, in equity it ought to be appropriated to the judgment they had: *Held*, that the judgment creditors, under whose executions the property was sold, though junior in date, had a prior equity in the fund. *Hand* v. *Grant*, 514.

38. G. filed his bill, alleging, that a judgment at law had been obtained against him as indorser of a note, on which the maker and other parties were sued; that the service of process was not in accordance with the statute, and he had no knowledge of the pendency of the action; that two attorneys filed a plea for him, and not employed by him, and without his authority or knowledge, and that due notice of the protest was not served upon him; the bill did not set up any facts that if proved, would constitute a good defence at law; it did not aver that the attorney was irresponsible in damages; one of the attorneys who filed the plea, proved that the plea was filed either by himself or his co-attorney at the request of the principal for all the parties; *held*, that the bill must be dismissed. *Harris* v. *Gwin*, 563.

39. And if the maker of the note suffer a judgment at law to be rendered against him on the note, he cannot afterwards obtain relief against the judgment, in equity, on the ground that the intended preëmptor, by his negligence, which

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occurred after the judgment at law, lost his prescription; the note being void, the defence at law was good, whether the other party carried out his contract, or not. *Brown* v. *Poindexter*, 596.

40. Under the foreign attachment law, (How. & Hutch. 520, § 63,) where there is a bill pending in equity against a non-resident defendant, who is indebted to the complainant, and a home defendant who has effects in his hands, of the non-resident, upon the affidavit of the absence of the non-resident and of the indebtedness, the court may make an order requiring the home defendant to give security to have the property in his hands forthcoming, to abide the ultimate decree of the court; or in default thereof that the property shall be delivered to the complainant upon his giving like security. *Trotter* v. *White*, 607.

41. And it seems that if the effects in the hands of the home defendant are claimed by him as his own, yet if the bill alleges them to be the property of the non-resident, claimed by the home defendant under a fraudulent assignment or sale from the non-resident, the attachment will lie, and the same relief may be extended as if the home defendant laid no claim to the effects in his hands. *Ib.*

42. The complainant, in a foreign attachment bill, may, *at the time of filing the bill*, upon a sufficient and proper showing for it, obtain an injunction against the transfer or removal of the effects in the home-defendant's hands. *Ib.*

See *Execution; Fraud; Vendor and Vendee; Receiver.*

CHICKASAW TREATY AND CLAIMS UNDER IT.

1. In an action of ejectment by an Indian claiming under the sixth section of the Chickasaw treaty, which provides that "reservations of a section each shall be granted to persons male and female, not being heads of families, who are of the age of twenty-one years and upwards, a list of whom, within a reasonable time, shall be made out by the seven persons hereinbefore mentioned, and filed with the agent, upon whose certificate of its believed accuracy, the register and receiver shall cause said reservations to be located upon lands fit for cultivation, but not to interfere with the settlement rights of others," — the Indian having shown the reservation and the location on the land in controversy, it was *held* not to be necessary for him to show that a list including himself was furnished by the seven chiefs and filed with the agent; nor to produce the agent's certificate of its believed accuracy furnished to the register and receiver prior to the location; the location itself was evidence that all the prerequisites had been complied with.

Wray v. *Ho-ya-pa-nubby*, 453.

2. Under the sixth section of the Chickasaw treaty, the term "*reservation*" is equivalent to an absolute grant; and it needs only the *location* of the land to give the reservation identity, to make the title in the reservee absolute and complete; and where, after such location, the general government issues a patent to the same land to a third party, the patent will be wholly *void*, even at law. *Ib.*

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3. In an action of ejectment by an Indian claiming under the sixth section of the Chickasaw treaty, it is not competent for the defendant to show what certificate was appended to the roll of the reservees returned by the chiefs and agent to the register's office, when it appeared that the name of the Indian plaintiff was in that list; the Indians had done all in their power to secure their reservations by having their names put upon the roll; if the agent afterwards neglected his duty, by failing to annex a proper certificate to the roll, the Indian is not to be prejudiced thereby. *Ib.*

4. The instructions from the war department as to the construction of the Chickasaw treaty, have no binding force; that department could add nothing to the terms of the treaty without the consent of the other; and as the sixth section contained the positive stipulation that the reservations should be located by the register and receiver, the instruction from the war department, "that no location under any of the articles of the treaty should be considered as final, or as conferring any right whatever until the same should be approved by the president," is not obligatory. *Ib.*

5. Under the eleventh article of the Chickasaw treaty, the *residue* of the Chickasaw country, after the reservations were taken and located, was the only portion which could be sold, as public lands of the United States. *Ib.*

6. The fourth article of the treaty with the Chickasaw Indians, provides, in substance, that while many of the Indians were capable of managing their own affairs, yet others were not, and might be imposed on; therefore none of the reservations admitted under the treaty should be sold, leased, or disposed of, without the certificate of *at least two* of seven named persons, of whom five signed the treaty for the Indians, that the party owning or claiming the reservation was capable of managing and taking care of his affairs; which fact should also be certified by the agent, and also that a fair consideration had been paid: one of the seven persons named in the treaty, the certificate of two of whom was required to make a sale valid, sold his reservation without having procured such certificate: *Held*, that the spirit of the treaty did not embrace those who were by the treaty itself appointed to judge of the capability of others, and that the sale by him, without such certificate, would be valid. *Pointer* v. *Trotter*, 537.

COMMISSIONERS OF INSOLVENCY.

Does the statute prescribing the length of time in which commissioners of insolvency shall keep the commission open, mean by the word "*months*" lunar or calendar months? *Stewart* v. *Davidson*, 351.

COMMISSIONER'S SALE.

1. As a general rule, a sale made by a commissioner in chancery under a decree to foreclose a mortgage, must be reported to the chancellor and confirmed

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by him, or there must be some act of the parties equivalent to a confirmation before the sale will be valid. *Gowan* v. *Jones*, 164.

2. It seems, that great lapse of time would be equivalent to a confirmation by the court of a sale. *Ib.*

3. In an action of replevin to recover possession of a slave, the plaintiff proved, by the record of the case, that a decree of the superior court of chancery had been rendered against the husband of the defendant for the foreclosure of a mortgage on certain slaves; he also produced a bill of sale of the slave sued for, from the commissioner appointed by the decree to sell; but offered no evidence, that the sale by the commissioner had been confirmed by the chancery court; *held*, that the plaintiff could not recover. *Ib.*

CONSIDERATION.

1. In a trial of the right of property in slaves, the claimant relied on his purchase of the slaves under a deed of trust given by the defendant in execution to secure him from loss in consequence of his suretyship for the defendant in execution; the court below, after having instructed the jury that the deed of trust was *prima facie* good and valid, instructed them that it rested with the claimant to prove the consideration of the deed of trust to be fair and *bona fide*, and to show clearly that he was liable for the payment of the debts named in the deed of trust, as surety for the defendant in execution; it was *held* that this latter instruction was erroneous, because it implied that the plaintiff in execution had made out a *prima facie* case of fraud, with reference to the deed of trust; the court should have added the qualification, "if the jury believe from the evidence that a *prima facie* case of fraud has been made out, then the claimant must prove," &c.
Gilliam v. *Moore*, 130.

2. Where the plaintiff, in an action of ejectment, claims title under a deed of trust, executed by a third party, in his favor, and the defendant claims title under a sheriff's deed of the interest of such third party, it is not necessary for the plaintiff to introduce proof to establish the consideration on which the deed of trust was executed; it will be *prima facie* valid; if the defendant seeks to impeach it he must do so by proof. *Brown* v. *Bartee*, 268.
See *Guaranty*.

CONSIGNOR AND CONSIGNEE.
See *Bailment*.

CONSTITUTION.

See *Probate Court*, whether the act of 1846, with reference to, can be retrospective, constitutionally; see *Hancock County Seat*, law of 1846, with

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reference to, constitutional; see *Forcible Entry and Detainer*, court of justices to try, constitutional; see *Probate Court*, the law giving to probate, right of partition in all cases unconstitutional.

CONTEMPT.

It is an unusual mode of practice to permit a party charged with a contempt to put in a plea by attorney, without an appearance in person; the regular mode is for him to answer interrogatories upon oath, so as to clear himself of the contempt. *Vertner* v. *Martin*, 103.

CONTRACT.

1. S. bought certain slaves of M. subject to a deed of trust, and in payment agreed to extinguish the deed of trust; there were judgments against M. older than the deed of trust or sale to S.; S. extinguished the incumbrance on the slaves, and they were levied on under the judgments; S. filed his bill for a rescission of the contract of purchase: *Held*, that S. was not entitled to have the contract rescinded; M. had made no false representations; nor had S. been at all deceived, and must abide by his bargain.

Lewis v. *Starke*, 120.

2. In February, 1839, T. executed a deed of trust to W. as trustee, to secure the payment of a sum of money to B. In April, 1839, a judgment was obtained against T., and, under execution on this judgment, R., in 1842, bought the property conveyed by the deed of trust. In May, 1839, T. executed a deed in fee simple to B. of the same property. In 1842 W., the trustee, sold the property under the deed of trust, and it was bought by B., who sued R. in ejectment for the property; *held*, that the absolute conveyance by T. to B., in May, 1839, did not vest in B. the legal title, and thus merge the deed of trust; that T. had but an equity to convey to B., and by his deed he only conveyed that equity. The perfect, legal title was in W., the trustee, and never passed out of him until the sale under the deed of trust, by which B., having before the perfect equitable, became also the owner of the perfect legal title; and therefore no title passed to R. by the sheriff's deed. *Brown* v. *Bartee*, 268.

3. Where the grantee, in a deed of trust, subsequently conveys the property granted, to the *cestui que trust*, the deed of trust is not thereby extinguished, merged or rescinded; parties holding mere equities can only dispose of equities, they cannot affect the legal title. *Ib.*

4. The execution, by the grantor in a deed of trust, of an absolute deed, by which he conveys the property formerly conveyed in trust, absolutely to the *cestui que trust*, is not a *payment of the deed of trust;* the absolute deed only operated to extinguish the grantor's interest; the legal title still remained in the trustee. *Ib.*

5. Where a sale takes place under a deed of trust, the purchaser acquires that

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title which the grantor in the deed of trust had at the time it was executed; and if judgments have been obtained against the grantor, since the execution of the deed of trust, they bind only the grantor's equity, which the judgment creditor might whilst it existed have appropriated, by proper means. *Ib.*

6. In the ordinary course of things an agent, contracting in behalf of the government, or of the public, is not to be presumed to have bound himself personally, nor is it to be presumed, that the party dealing with him in his public character, means to rely on his individual responsibility; but the contrary may be shown by proof, or circumstances which clearly establish an intention between the parties to the contract to create and rely upon a personal responsibility on the part of the public agent.

Copes v. *Matthews*, 398.

7. In an action of assumpsit on the common counts for money loaned, the written acknowledgment of the defendant, that he had received a specified sum from the plaintiff, in consideration of which he sells him a slave, the sale to be void on the repayment of the money at a specified time, is competent evidence to sustain the count. *Coor* v. *Grace*, 434.

8. Such writing proved the loan of the money, and an undertaking to secure its repayment, and in the absence of any proof of an actual repayment, or of the delivery of the slave by the defendant to the plaintiff, the plaintiff made out a *prima facie* case, on which the jury did right to find for him. *Ib.*

9. B. owed J. B. seventy-one bales of cotton, and C. owed B. forty bales of cotton, due each in December, 1840; in June, 1841, C., at B.'s request, drew a blank bill of exchange, and gave B. power to fill it up with the value of the forty bales of cotton he owed B., and also with the value of thirty-one more bales, in order that B. might give the bill to J. B. in payment of the seventy-one bales due by B. to him; B. and J. B. calculated the value of the cotton at ten cents per pound, and filled the bill up with the sum thus ascertained; C. alleging that cotton was worth but *seven* cents per pound, in December, 1840, when the cotton was due, sued J. B. to recover the three cents per pound over paid; it was proved that cotton was worth but seven cents in December, 1840, but in the spring of 1841 had been worth ten cents; the jury found for the defendant. *Held*, that the verdict was correct; if C. had any claim it was against B., and not against J. B.; the two latter had the right to make their contract in their own way, and settle on their own terms, and in the absence of all fraud the agreement between them would not be set aside. *Coppage* v. *Brown*, 605.

See *Chancery*, *Consideration*, *Covenants*.

COVENANTS.

1. Covenants are to be construed as nearly as possible by the intention of the parties, to be gathered from the whole context, to be interpreted according to the reasonable sense of the words. *Wadlington* v. *Hill*, 560.

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2. In contracts where either party may be compelled to part with his money or property without receiving the stipulated equivalent, the party seeking to enforce the contract must make his own part of the agreement precedent, and must allege either a performance or a tender and refusal. *Ib.*

3. H. bought a tract of land of W. for $ 10,500; paid five thousand dollars in cash, and entered into a covenant with W. to pay five thousand more in ten days, and five hundred on the first of January, thereafter, and W. covenanted "on the payment of the five thousand dollars last named" to execute good and sufficient titles for the land to H.; the latter being sued on the covenant for the $ 5,500 plead that W. had failed to have made to him a tender of a deed of conveyance of the land: *Held*, on demurrer, that the plea was a good bar to the action. *Ib.*

4. A vendor of land, who stipulated by his title bond to make the vendee "*a good and perfect deed*" to the land sold, does not discharge his covenant by the execution of a deed good in point of form; but fully to comply with his covenant, he is bound to make a good and perfect title to the land, and to remove any existing incumbrance, or protect the vendee against it.

Greenwood v. *Ligon*, 615.

5. And it seems that the failure of the vendor to procure his wife's relinquishment of dower, would be a breach of the covenant to make "*a good and perfect deed.*" *Ib.*

6. Technical rules are not so much to be consulted in the construction of covenants, as the real meaning of the parties, where it can be gathered from the instrument itself; and that construction should be favored which is obviously most just. *Ib.*

CRIMINAL LAW.

1. The law which authorizes the circuit court to appoint a district attorney, to supply the temporary absence of that officer, is not unconstitutional; although the constitution makes the district attorney elective, yet if he be not in attendance to discharge his duties, the state has a right to employ other counsel to discharge them for him; and when so discharged, they will be valid. *Keithler* v. *The State*, 192.

2. Express power is conferred by the constitution, (Art. 5, § 13,) upon the legislature, to provide for the filling of all vacancies not therein provided for; under this power, it seems that if the absence of the district attorney causes even a temporary vacancy, it may be provided for by the legislature. *Ib.*

3. The signature of the district attorney is not essential to the validity of an indictment; it is not by the common law; nor is made so by any statute in this state; while it is a practice for them to sign indictments, and one that should be followed, yet it is not indispensable; and an indictment duly preferred by the grand jury, will be valid, though without the signature of the district attorney, or it seems with the name of one

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signed to it, who was not the legal district attorney; if it were otherwise, the district attorney could never be prosecuted for any offence. *Ib.*

4. Under the statute of this state, which provides that no conviction for any offence, excepting perjury and subornation of perjury, shall disqualify, or render such person incompetent to be a witness in any cause, civil or criminal, but the conviction should only go to his credibility, it was *held*, that a principal, found guilty of murder, and *condemned to be hung*, was a competent witness against a person indicted as an accessory before the fact, to the same murder. The statute was designed to remove a disability; mere *conviction* never disqualified; it was the *judgment* which disqualified; the statute must, therefore, be considered to have reference to the *judgment*. *Ib.*
5. Since this statute, removing the infamy, a condemned principal may now testify against his accessory. *Ib.*
6. On the trial of a prisoner indicted as an accessory to murder, the record of the conviction of the principal, is evidence to prove that conviction, and all its legal consequences, though not evidence of the fact of the guilt of the prisoner. *Ib.*
7. The circuit judge, on the trial of a person charged with crime, has the right to modify the instructions asked of him in behalf of the state or prisoner, and to give that modification *verbally;* and if the prisoner objects to the modification, he must except to it at the time, and embody the modification in a bill of exceptions, that the high court may judge of its propriety; if he omit to do this, and permit the jury to retire, it will be too late to object to it afterwards, and it will not be error for the judge, to refuse to call the jury back and repeat the modifications to them, nor to refuse to allow the modifications when written out by the judge after the retirement of the jury, to be sent in to the jury, although the prisoner's counsel stated, that they understood the verbal modifications given to the jury, to be different from those written out by the judge; the latter, however, stating that they were literally the same. *Ib.*
8. The law of 1846, on the subject of charges by judges to the jury, does not, it seems, apply to criminal trials; yet if it did, that provision in it which requires that the charges or modifications must be in writing, unless *by the consent of both parties*, covers the case of modifications given *verbally*, which the record does not show, were objected to at the time; in the absence of objection appearing on the record, assent will be presumed. *Ib.*
9. On the trial of a prisoner, charged with being an accessory to murder, the court instructed the jury that, "it made no difference to the merits of the case, whether the principal conceived the design to kill the deceased before his interview with the prisoner or not, if the prisoner encouraged him in the design, by falsely stating to him threats of the deceased, the prisoner was guilty;" *held*, that the instruction, taken in connection with the evidence, was not erroneous. *Ib.*
10. While the evidence of an accomplice is to be weighed with great

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jealousy and distrust by a jury, yet his *credibility* belongs exclusively to them; and it is impossible for the court to say, as a question of law, that he should not be believed; though he contradict himself, and be contradicted by others, yet the jury are to give his testimony what weight they please, and they may believe him, whether corroborated or not. *Ib.*

11. A voluntary statement made by a criminal is of but little weight, and if he afterwards, on oath, contradict that voluntary statement, the jury are to judge how far it impairs his credibility. *Ib.*

12. The prisoner was indicted as an accessory to murder, and found guilty; the principal, being convicted, was a witness on the trial, and swore positively to the guilt of the prisoner; but as he had made contradictory statements, and his testimony in part, was contradicted in other particulars, the court entered into an examination of the other testimony in the case, and came to the conclusion, that whilst there were strong reasons to question the credibility of the principal, yet the verdict was not given without corroborating circumstances, and must stand. *Ib.*

13. An indictment, which charges the accused "with an assault and battery with a deadly weapon upon a certain slave, *with the intent to commit manslaughter*," can be construed to be an indictment for only an aggravated assault. It is not an indictment for *an assault with intent to kill*, by which is understood and has been held, an intent to commit murder.

Bradley v. *State*, 618.

14. On the trial of a man, indicted for an assault and battery with a deadly weapon on a slave, with intent to commit manslaughter, the proof by a single witness that the prisoner was seen with a knife in his hand in pursuit of the slave when he was stopped by the witness, and then made threats against the life of the slave; *held*, to be entirely insufficient to warrant the prisoner's conviction. *Ib.*

15. The vice-chancellor, created by the act of 1842, is constituted by the act a *conservator of the peace;* as such, he has power to commit all breakers of the peace, or to bind them in recognizances to keep it, or to answer for offences committed against it. *State* v. *Wofford*, 626.

COUNTY SEAT.

See *Board of Police; Hancock County Seat.*

DEBTOR AND CREDITOR.

See *Execution, Fraud, Judgment.*

DEED OF TRUST.

Where a sale takes place under a deed of trust, the purchaser acquires that title which the grantor in the deed of trust had at the time it was executed;

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and if judgments have been obtained against the grantor, since the execution of the deed of trust, they bind only the grantor's equity, which the judgment creditor might, whilst it existed, have appropriated, by proper means.
Brown v. *Bartee*, 268.

See *Consideration*, *Fraud*, *Title*.

DEFENCE AT LAW.

See *Chancery*.

DISTRICT ATTORNEY.

See *Criminal Law*.

DOWER.

On an application for dower in personalty, if it appear that the testator did not own the property in which the dower is sought, at the time of his death, it is the duty of the probate court to refuse to allot the dower.
Cameron v. *Cameron*, 394.

See *Husband and Wife*.

EJECTMENT.

If, in an action of ejectment, it be proved that the *tenant* of the defendant is in possession of the premises in controversy, it will be sufficient; proof of the tenant's possession is proof of the landlord's. *Smith* v. *Walker*, 584.

See *Execution*.

EQUITY.

See *Chancery*.

ESCROW.

1. To an action on a deed or bond, if it be plead that the instrument sued on was an escrow, the plea must aver upon what condition the deed or bond was executed; such an averment is indispensable to the plea of an escrow.
Graves v. *Tucker*, 9.

2. P. and B. and G. being sued as sureties on a bond executed by R. S. G. as principal, and them and M. and H. as sureties, payable to the state, conditioned for the faithful discharge by R. S. G. of his duties as state treasurer, plead that M. and H. had signed and sealed the bond as sureties, when it was presented to them; and they signed and sealed it likewise, as sureties, in the belief that the bond was the valid act of M. and H.; but that M. and H. had delivered the bond to R. S. G., the principal, to be binding on M. and H., on condition that W. H. and S. P. would also exe-

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cute the same, and that W. H. and S. P. had not executed it, by which means M. and H. were not liable on the bond, wherefore, &c.; *held*, that this plea was not the plea of an escrow. *Ib.*

3. To an action on a bond against the sureties of the principal, two of the sureties plead that they had delivered the bond to the principal, as an escrow, to be obligatory on condition that two others should execute the same, who had never done so. It was proved that the principal stated to one of these sureties that the two others should sign it as co-sureties, to which the defendant replied, if they would execute the bond he would, and accordingly did so; the cause, upon this pleading and proof, was submitted to a jury, who found against the sureties; *held*, that their verdict was in accordance with the law and evidence; the bond, under the pleading and proof, was not delivered as an *escrow;* to constitute an escrow the delivery must be to *a stranger* (not to one of the parties) to be held by him until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. *Ib.*

ESTATE OF DECEDENTS.

See *Executor and Administrator.*

EVIDENCE.

1. In an action on a note given for land, where a bond for title has been given by the payee, it is competent to introduce the bond in evidence to explain the note. *Williams* v. *Jones*, 108.
2. Whether a party to a *negotiable instrument*, who has given it credit and currency, by his signature, shall afterwards be admitted as a witness, in a suit between other persons, to prove the instrument *originally void,—Quære.* *Williams* v. *Miller*, 139.
3. A party to a *non-negotiable* instrument is admissible, as a witness *to prove it void;* or, if the instrument be negotiable, he is competent to prove payment, or anything which does not impeach the note, but only goes to show its discharge, or he is competent to testify if he had indorsed the note without recourse. *Ib.*
4. W., as principal, and others, as sureties, being indebted, by joint note to P., W. paid the note to P., and the latter delivered up the note to W., who prevailed upon P. to indorse it, after the payment, without recourse; in an action on the note, against the principal and sureties, by M., it was *held*, that P. was a competent witness to prove these facts. *Ib.*
5. Where a judgment-debtor is garnisheed as a debtor of his judgment-creditor, and the fact of indebtedness is in issue, the judgment against the garnishee, makes out a *prima facie* case against him, and if he has discharged it he must show it. *O'Brien* v. *Liddell*, 371.
6. In an action of assumpsit on the common counts for money loaned, the writ-

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ten acknowledgment of the defendant that he had received a specified sum from the plaintiff, in consideration of which he sells him a slave, the sale to be void on the repayment of the money at a specified time, is competent evidence to sustain the count. *Coor* v. *Grace*, 434.

7. Such writing proved the loan of the money, and an undertaking to secure its repayment; and in the absence of any proof of an actual repayment, or of the delivery of the slave by the defendant to the plaintiff, the plaintiff made out a *prima facie* case, on which the jury did right to find for him. *Ib.*

8. By statute of this state, (How. & Hutch. 605,) copies of records appertaining to land offices, duly authenticated, are made evidence; in an action of ejectment, therefore, by an Indian claiming under the sixth article of the Chickasaw treaty, the certificate of the register of the land office of the district, showing the date of the location of the Indian on the land in dispute, is competent evidence. *Wray* v. *Ho-ya-pa-nubby*, 452.

9. The presumption of the correctness of official action is a general one, and applies to most acts of an official or ministerial character. *Ib.*

10. A party is not confined to any particular order in the introduction of his testimony; but when he offers testimony, and it is excluded, and he excepts to the exclusion, it must be shown affirmatively during the progress of the trial, that the testimony offered and excluded was relevant and pertinent.

Torrey v. *Fisk*, 590.

See *Attorney at Law;* when a competent witness. See *Criminal Law;* when accomplice competent. See *Record;* when duly authenticated. See *Chickasaw Treaty*, what evidence to sustain claim under.

EXECUTION.

1. Whether an execution which issues on a satisfied judgment is void or only voidable, and whether a sale of lands under it is void, or only voidable, *quære.* Whether void or not, it is certain that the *lien of the judgment* is destroyed by the payment of the judgment; and a sale under an execution on such paid judgment, if valid at all, cannot relate farther back than the time when the execution went into the hands of the sheriff.

Banks v. Evans, 35.

2. Where property was sold under several executions, and the sheriff's deed recited a particular execution, among others, as one under which the sheriff sold; and a purchaser of the same property at marshal's sale, sought, by bill in equity, to have the sheriff's deed cancelled, and alleged as one ground therefor, that the particular execution recited in the sheriff's deed, was paid before the sale, and was not in the sheriff's hands at the time of sale, and the sheriff's vendee alleged his belief that the execution referred to *was* in the sheriff's hands at the time of sale by him, and there was no evidence to support the allegation of the complainant; it was *held* that the

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complainant had failed to make out his case, or to impeach the defendant's title. *Ib.*

3. Where property is sold under several executions, if the proceedings in one case be regular the sale will be valid, though all the others be irregular and vicious. *Ib.*

4. It seems that it is not a valid levy of an execution upon personal property, if it is not taken into the possession of the sheriff; where, therefore, a sheriff, having various executions against J., went to J.'s plantation, and saw a quantity of cotton at J.'s gin, supposed to be about seventy-five bales, and was told by J. that he had seventy-five bales more in a warehouse at a distant point which the sheriff did not see; and the sheriff took no part of either lot of cotton into his possession, and never sold either, but J. shipped and sold them; and the sheriff returned that he had *levied* the executions on this one hundred and fifty bales of cotton; it was *held* that the facts did not amount to a *levy* on the cotton. *Ib.*

5. A levy upon sufficient personal property is not an actual, but only a *prima facie* satisfaction of the judgment; if legally removed, or removed without the intervention or act of the plaintiff in the execution, it is not a satisfaction. It seems a levy on personal property is never deemed a payment, except in those cases where, if it were not, the defendant would be twice deprived of his property on the same judgment. *Ib.*

6. This was a case depending upon the fact, whether a particular judgment, under which the property in controversy was sold, was paid before sale; if paid before sale the purchaser's title would have been inferior to that of the claimant; the facts are reviewed, and the conclusion reached, that the execution was *not* paid before the sale; yet, inasmuch as the facts were complicated, and the record not as perspicuous as it might have been, the claim of the defeated party was dismissed without prejudice to any rights which he might afterwards wish to assert. *Ib.*

7. The doctrine that, where there is a misapplication of money made on executions by the sheriff, the judgment, which is *entitled* to the money, is *satisfied* thereby, must be limited to the case where *all the executions have been levied* on the property sold, and the sale has taken place under all; it has no application to executions not *actually levied*. *Ib.*

8. It seems that where a sheriff has several executions of *fieri facias* in his hands, a levy of one is *not* a levy of all. He may levy some on personalty, some on realty, and not levy others at all. *Ib.*

9. Where three executions have been levied on the same property of the defendant therein, and a third party has claimed a portion of the property thus levied on, and given a bond to try the right, and the plaintiffs in two of the executions tender issues to try the right which were joined in by the claimant, while the plaintiff in the third execution failing to tender an issue, the court rendered a judgment discharging the claimant from it, and dismissing the trial as to it, and on the issues tendered by the others, part of the

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property was held liable to the judgments; and executions issued against the claimant, who paid the money to the sheriff; *held*, that the plaintiff in the execution, which tendered no issue for the trial of the right of property, had no claim to any part of the money thus paid by the claimant.

Martin v. *Lofland*, 317.

10. The statute which declares, that if from the default of the plaintiff in execution an issue shall not be made up to try the right of property, the claimant shall be discharged from the bond given, and the property therein mentioned shall not thereafter be liable to satisfy the plaintiff's execution, is a complete discharge of the property from liability to the execution; and if it be afterwards sold on other executions, the plaintiff who has thus abandoned and forfeited his right to it cannot claim the proceeds. *Ib.*

11. If a sale take place under three executions, and either of the judgments on which they issued bind the property of the defendant, it is sufficient to pass his interest to the purchaser; though neither of the other judgments bind the property. *Hand* v. *Grant*, 514.

12. A sheriff sold property of J. under three executions against him; it was bought by H., who did not pay the purchase-money; the sheriff sued him, and recovered a judgment against him therefor, which H. sought to enjoin on the ground, that he had become a judgment creditor of J. of older date than two of the executions under which he bought, and that as the sheriff had not paid the amount of their bid over, in equity it ought to be appropriated to the judgment they had: *Held*, that the judgment creditors, under whose executions the property was sold, though junior in date, had a prior equity in the fund. *Ib.*

13. The vendee of land, subject to execution against the vendor, is substituted to the right of redemption, which the vendor enjoys under the first section of the redemption law of 1842; and when the land is sold under the execution against his vendor, he may redeem it according to the statute.

Watson v. *Hannum*, 521.

14. Where land has been sold under execution, which the defendant in execution had subsequent to the judgment against him, but prior to the sale under execution, sold to a third party, such vendee will have the right under the redemption law to redeem the land from the sheriff's vendee; and where another judgment-creditor of the defendant, in the first execution, has redeemed the land from the sheriff's vendee, the first vendee will have the right to redeem from such judgment creditor by paying him the amount he paid the sheriff's vendee and the statutory interest; but in such case the judgment-creditor will have the right to advance on his bid, and if he is willing to credit his execution with, or pay, more than the first vendee is willing to pay, he will hold the land; if otherwise, the first vendee can still redeem from him. *Ib.*

15. It seems that under the redemption law, when the defendant in execution, or his vendee, wishes to redeem land sold under execution, which land the

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sheriff's vendee has already conveyed to a judgment-creditor of the defendant in execution, who has redeemed it from the sheriff's vendee, the defendant in execution, or his vendee, must tender their redemption money to such judgment-creditor, or if he be a non-resident, to the sheriff of the county; yet if the vendee of the defendant in execution, before the expiration of two years allowed for redemption, files his bill for redemption against all the parties, and offers to pay whatever redemption money is due, it will be a sufficient offer to redeem, and the chancery court should then compel the judgment-creditor to state the *ultimatum* to which he will advance his bid, and submit that to the conclusion of the defendant in execution's vendee. *Ib.*

16. Where property has been sold under execution in favor of a bank, the notes of which are at a depreciation, and a judgment-creditor of the defendant in execution has redeemed from the sheriff's vendee, by paying the agreed value in specie, of his bid, which was paid in the notes of the bank, the defendant in execution, or his vendee, in seeking to redeem, need only tender to the judgment-creditor the amount in good money with the statutory interest, which the judgment-creditor paid the sheriff's vendee, and such additional sum as the judgment-creditor may be willing to advance on his bid. *Ib.*

17. An equity of redemption in slaves is not the subject of execution; a levy, therefore, on such equity should be set aside.
Commercial Bank of Manchester v. *Waters*, 559.

18. A *supersedeas* is not the proper remedy for the violation, by a plaintiff in execution, of an injunction against the issuance of the execution; an attachment for contempt of the injunction is the proper remedy. *Ib.*

19. A motion to erase a credit on an execution, made more than five years after the indorsement of the credit and the return of the execution, cannot prevail; the plaintiff in the execution is presumed to have known of the return, and from the lapse of time without objecting to it, he will be presumed to have acquiesced in it. *Haralson* v. *Holcombe*, 581.

20. It seems that if urged in due time, it would be good ground to set aside the entry of satisfaction on an execution, that the money was paid after the return day of the execution; yet such payment is capable of confirmation, and long acquiescence must have the same effect. *Ib.*

21. A levy of an execution on *real estate* does not amount to even *prima facie* satisfaction of the execution. *Smith* v. *Walker*, 584.

22. But a levy on personalty is a *prima facie* satisfaction; yet it may be shown not to have been an absolute satisfaction. *Ib.*

23. Therefore, in ejectment, where the lessor of the plaintiff claimed under a sheriff's deed, and the defendant showed that a prior execution on the judgment under which the lessor bought had been levied on personal and real estate sufficient to satisfy it, it was *held* competent for the lessor to show that this previous execution had been levied with others against the same defendant, and this levy disposed of by a sale that did not yield sufficient to

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pay off the other executions levied at the same time, and which were on older judgments than the one under which the lessor bought. *Ib.*

See *Chancery, Forthcoming Bond, Title.*

EXECUTOR AND ADMINISTRATOR.

1. It is no bar to a proceeding in the probate court for an attachment against an administrator for a contempt, in failing to pay a sum of money which he had been previously decreed to pay, that a former citation had issued for the same subject-matter upon the petition of the same party, and that on the hearing thereof the same had been dismissed by the court.

Vertner v. *Martin*, 103.

2. Where, therefore, in a proceeding for such attachment, such a former citation was plead in bar, it was *held*, that the defence being unavailable, a peremptory attachment was properly ordered. *Ib.*
3. The issuance of citation in the probate court to an administrator, on a judgment of the court, ordering him to pay money, is only process intended to carry into effect the judgment of the court; and the quashing or dismissal of final process does not affect the judgment from which it emanates. *Ib.*
4. M. as administrator of R. M., deceased, had sold a tract of land to G. and taken his notes, with surety, for payment, and had retained the statutory lien upon the premises, as further security. G. became insolvent, leaving one of the notes unpaid, and M. having exhausted his remedy at law, was proceeding to enforce his statutory lien against the land. W. had purchased the land of G. and given his notes therefor, one of which had been transferred to H. who had brought suit upon it; the deed from M. to G. showed that the land was sold by him, as administrator, under an order of the probate court, and that a portion of the purchase-money had not become due at the time G. sold to W. *Held*, that W. was justly chargeable with notice, and could occupy no better place than G., and that M. had a right to priority of satisfaction. *Hoggatt* v. *Wade*, 143.
5. It is the duty of an administrator, when he sells the land of his intestate, to take personal security for the payment of the purchase-money, and his performance or non-performance of that duty does not affect the statutory lien; each is intended to be cumulative. Whether anything short of actual payment will discharge the lien,—*Quære.* *Ib.*
6. M. as administrator of R. M., deceased, sold a tract of land to G. and B., and took the separate notes of each, with personal security, for their respective halves of the purchase-money. *Held*, that there was nothing in this transaction which could release the statutory lien. *Ib.*
7. The statutory lien is for the benefit of the estate, and the administrator ought not, by construction, to be held to have done anything to its prejudice. *Ib.*
8. It seems that where an administrator's account is contested in the probate court by one of the distributees, and it is sought to hold him liable for the

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services of a slave of the estate for a series of years, as an offset to which, the administrator sets up disbursements for the board and maintenance of the distributee, it is a case peculiarly fitted for the consideration of a jury under the statute (How. & Hutch. 472, § 17, 18,) in the circuit court; yet, if it be otherwise agreed that the probate court shall determine the controversy, and that court does determine it accordingly, its decision, if otherwise correct, will not be set aside. *Price* v. *Mitchell*, 179.

9. The charge by an administrator, in his accounts as such, for disbursements made by him for board and maintenance of infant distributees, does not pertain to an administration account, and is not allowable, as a general rule. *Ib.*

10. Yet where an administrator, in the settlement of his final account, was sought to be held liable by the children and distributees of his intestate, for the hire for a series of years of a slave of the estate of the intestate; and as an offset the administrator charged for sums expended for these distributees, both before and after the grant of letters of administration to him; and it was agreed by the parties, that the probate court should decide the matter, and "in making its decree, should take into consideration the hire of the slave, and also the support of the heirs for the same period of time, and strike the balance;" and the probate court made its decree accordingly upon that basis; it was *held*, on appeal from that decree, that the high court of errors and appeals would not disturb a result which had been brought about by the parties themselves. *Ib.*

11. It has never been decided in this state, that an administrator's vendee would be affected by any mere irregularity, on the part of the administrator, in making the sale, after a valid order and judgment condemning the land to be sold. Whether a failure by an administrator, after such order to give the notice of the sale, as required by the statute, would vitiate the sale,—*Quære.* *Monet* v. *Jones*, 237.

12. The statute of this state (H. & H. 355, § 35,) provides for the grant of letters of administration by the probate court of the county where the intestate had his residence, or if he had none, of the county where he died, "or of that (county) wherein his or her estate, or the greater part shall be;" *held*, by the latter clause of the act was alone intended that county in which the estate might be at the time of the decease of the intestate, and not the county where the estate might be at the time of the grant of letters of administration. *Wright* v. *Beck*, 277.

13. B. alleged, in her petition to the probate court of Yalabusha county, that J. B. died in the state of Arkansas, that part of his property since his death had been improperly removed into that county in this state, and W. had taken out letters of administration thereon, and sold part of it; that she was the widow of J. B., and prayed that the letters of administration might be revoked, the administrator's sales set aside, and she herself appointed administratrix; the probate court decreed according to the prayer of the petition. *Held*, that the grant of letters to W. was *coram non judice*, and properly set

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aside and revoked, but the probate court had no jurisdiction to set aside the sales made by W., and so far its decree was erroneous. *Ib.*

14. Executors and administrators are bound to the exercise of such prudence and caution in the administration, as a judicious man, looking to his own interests, would exercise in regard to his own affairs. *Bailey* v. *Dilworth*, 404.

15. They may compound debts, or enter into arbitrations, and these acts will be upheld, if they are fair, beneficial to the estate, and free from fraud, negligence and misconduct. *Ib.*

16. If, therefore, executors or administrators collect debts in bank paper not strictly at par, when the best interests of the estate require it, and when nothing better can be done, their conduct will be sustained; but in such case it will be their duty to convert the funds so received into something less perishable, with as little delay as possible. *Ib.*

17. Where a decree of the probate court is rendered, confirming and allowing the final account of an executor or administrator, by which the executor is brought in debt to the estate in a specified sum, in dollars, without distinction of currency, *constitutional currency* will be thereby intended; and in an action on such executor's or administrator's bond to recover the amount so decreed, it will be incompetent for the executor or administrator to show that in good faith he collected depreciated paper of local state banks, when it was the very best he could do for the estate; and that the balance of his final account against him was for the depreciated paper; the decree of the probate court being *for so much money*, was final and conclusive between the parties until reversed, and could not thus incidentally be rendered of no value by the circuit court. *Ib.*

18. Where an administrator has collected the debts due his intestate, in depreciated bank notes, he should report fully his proceedings to the probate court, that that court may make such allowances to him as the circumstances warrant, and may render a decree accordingly; if he omit to do so, and allow a decree to be rendered against him in the probate court for the full amount of the money thus received, it will be too late for him afterwards to attempt a defence thereto, when sued on his bond for the money thus decreed against him. *Ib.*

19. In October, 1840, the probate court confirmed the final account of an executor, by which he appeared to be indebted to the estate in the sum of $4,000; and, in January, 1841, the court entered a decree against him to pay the money, upon which the executor paid to the clerk of the probate court the amount of the decree in the notes of different banks much depreciated; the executor being afterwards sued on his bond for the amount of the decree, offered to prove this payment to the probate clerk; *held*, that payment being made to an officer who had no authority to receive it, it could have no influence on the case. *Ib.*

20. Where an estate has been reported insolvent to the probate court, and an order made by that court, that the real estate shall be sold, the administrator

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thereof has by such order of sale become so far invested with the legal ownership thereof, as to enable him to remove incumbrances on the real estate by bill in equity, and have the title perfected, so that the decree of sale may be carried out for the best interests of the estate and of the creditors.

Williams v. *Stratton*, 418.

21. F. bought of B. a lot of ground for $1000, paid half in cash, and gave his note, with S. as indorser, for the residue, and took a bond for title when his note should be paid; and left the bond with S. as his indemnity for the indorsement; F. died, leaving W. his executor, who sold the lot at private sale to D. for $1400, $500 of which was paid in cash, with which W. paid the note indorsed by S., and induced B. to make a deed of the lot to D., who, becoming dissatisfied with his bargain, cancelled the sale with W. by the agreement that W. should retain the $500 paid B., and should give up to D. his notes for the residue of the $1400 agreed to be paid, in consideration of which D. was to convey the lot directly to W. in his own right, which was done; *held*, on these facts, that the sale by W. to D. was void, and the conveyance by D. back to W. passed no title which could prejudice F.'s estate. *Ib.*

22. Nor would W., under such circumstances, be entitled to any equitable lien on the lot for the amount of the note indorsed by S. and paid to B.; for while a deposit of *all* the title-deeds, as a security for a debt created *at the time* the deposit is made, is generally recognized as constituting an equitable mortgage, yet in this case there was no evidence that S. delivered the title-bond left with him by F. to W. *as a security;* and if he did, W. delivered it to B. when the latter executed the deed to D., and the delivery up of the bond to B, would be, it seems, an abandonment of the equitable lien, if any existed, in favor of W. *Ib.*

23. Where an executor sold a lot of his testator, and received on the sale a cash payment, and by contract with the vendee and the executor, the sale was rescinded, and the cash payment relinquished to the executor by the vendee as the condition of the rescission, and the executor had previously, with the cash payment thus made, taken up a prior incumbrance on the lot created by his testator, it was *held*, that the executor was not entitled to a lien on the lot for the repayment of the money thus received and paid out by him; the property of his testator was not a subject for speculation in the hands of his representative; he could make no illegal disposition of it, and then claim a benefit of his own wrong. *Ib.*

24. Where there is no general personal representative, a special administration limited to the subject of the suit is generally required in equity.

Browning v. *Watkins*, 482.

25. H. brought suit against F. on a note; F., being doubtful of the ownership of the note, whether it belonged to H. or W. deceased, filed his bill of interpleader against H. and the heirs of W. (there being no administration on W.'s estate,) and brought the money into court. H. and the heirs of W.

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answered, the former insisting, also, on a demurrer; the vice-chancellor, on the proof, awarded the money to W.'s heirs: *Held*, it was not a case for a bill of interpleader; the heirs were not in a condition to assert a claim against H., and therefore there were not *two claimants* of the thing in controversy; administration ought to have been taken out on W.'s estate, and his administrator conducted the litigation in that behalf. *Ib.*

26. Where administration is taken out in another state, and the administrator there, in the course of administration, takes notes payable to himself *as administrator*, he may maintain a bill in his own name, in the courts of this state, to enforce their collection; and it will not make any difference that he styles himself, in such bill, administrator. *Trotter* v. *White*, 607.

See *Statute of Limitations*. See *Will;* when Administrator may protect property conveyed.

FORCIBLE ENTRY AND DETAINER.

1. The special court of justices established by the statute for the trials of forcible entry and unlawful detainer, is, under the power conferred by the constitution, on the legislature to establish such inferior courts as might be deemed necessary, a constitutional tribunal. *Rabe* v. *Fyler*, 440.

2. R. being the tenant of a bank, the latter conveyed by deed the premises occupied by R. to F. and H. as trustees; R. refusing to deliver the premises to F., one of the trustees, at the expiration of his tenancy, F. brought an action individually for an unlawful detainer against R.; and on the trial, read the deed from the bank to H. and himself, by which the property was conveyed to F. and H. in joint tenancy as trustees: *Held*, that *the right of possession* being one of the points in controversy in this proceeding, the deed was properly admitted in evidence to enable the jury to determine that right. *Ib.*

3. One joint tenant of property may, in his own name, maintain the action of unlawful detainer against one in possession of the property; in such action the question of *title* is not involved, but merely that of *possession;* and the possession of one joint tenant being in contemplation of law the possession of both, a recovery by one in this action would enure to the benefit of both; and the pendency of the action by one, or the judgment in his favor, might be pleaded to a proceeding by the other for the same cause. *Ib.*

4. On the trial of an unlawful detainer by F. against R., the plaintiff asked the court to instruct the jury that if they believed that R. was tenant of B., and B. assigned the premises to F. and H. with authority to collect the rent, and F. gave R. notice of this assignment and authority, and he made no objection, the jury have a right to find that R. was tenant of F.: *Held*, that the instruction was properly given. *Ib.*

5. In an action of *unlawful detainer* it is not necessary, if the defendant has disclaimed the relation of tenant, for the landlord to prove any demand of pos-

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session before suit brought; a disclaimer is equivalent to a demand and refusal. *Ib.*

6. Nor, it seems, will the defendant in such action, who has by his plea denied the plaintiff's right and litigated his claim, be permitted to object the want of a demand; yet if no demand of possession were made before action brought, and the defendant had, when demand was made by the suit, offered to deliver up possession when the writ was served, or when the plea was filed, he might have been entitled to his costs. *Ib.*

7. It was in proof, in an action for unlawful detainer, that the defendant was the tenant of one B., who had assigned the property to the plaintiff, and that the plaintiff had informed the defendant of the transfer, and that he must pay rent to him as his landlord, to which the defendant did not object: *Held*, that before the defendant could rely upon the statute of limitations of *three years*, it was incumbent on him to show when, if ever, his possession assumed *an adversary character*, as the statute would only commence running from that period. *Ib.*

FORTHCOMING BOND.

1. The surety on a forthcoming bond, becomes liable by signing and forfeiting the bond; the re-delivery of the property is the consideration; and he cannot go into equity, apart from his principal, to re-investigate the original judgment. *Baine* v. *Williams*, 113.

2. Where a judgment was rendered against A. & M., upon which execution issued and was levied on personal property; and B. joined with them as their surety in a forthcoming bond, which was forfeited; it was held, that B. could not seek relief in equity, in his own name, on the ground that the original judgment was founded on an usurious consideration. *Ib.*

3. Whether, where a forthcoming bond has been given and forfeited, a court of equity has jurisdiction to go behind the judgment of forfeiture, and inquire into the validity of the levy of the execution on which the bond was given — *Quære*. *Ib.*

4. Where a surety sought to be relieved from a forfeited forthcoming bond, on the ground that there had been no levy; and it was proved, that the sheriff came into the principal's store with the execution, and that he supposed both parties considered that a levy was there made on the goods; it was held, that the proof was entirely too vague to constitute the foundation of a decree, even if equity had jurisdiction. *Ib.*

5. A judgment quashing a forthcoming bond after its return term, is a *nullity*; therefore where such a judgment has been entered, and afterwards the original judgment on which the forthcoming bond was given is amended, and then execution issues on the amended judgment and a second forthcoming bond is given; the amended judgment and second forthcoming bond are *nullities*, for the reason that the original judgment was extinguished by

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the first forthcoming bond, and that bond, notwithstanding the judgment of quashal, is still in full force and effect. *Dowd* v. *Hunt*, 414.

FRAUD.

1. Where in a trial of right of property involving the question whether the sale to the claimant was fraudulent, the court instructed the jury, that if they believed the sale made by the defendant in execution to the claimant was intended wholly or in part to defraud, hinder, or delay creditors, the conveyance was void; but had previously instructed the jury that unless the claimant participated in the fraud of his vendor they must find for him; it was *held*, that if the one instruction were too broad, its error was corrected by the other. *Childress* v. *Ford*, 25.

2. On a trial of the right of property levied on under execution, the circuit judge instructed the jury that they might take into consideration facts which took place after the purchase by the claimant, which went to explain the intent of the parties to the sale when it was made; *held*, that the instruction was not erroneous. *Ib.*

3. A. & B. conveyed a tract of land to T. in fee simple; A. & B. held the title to the land for the use of C., and the deed was made to T. for the benefit of H., but neither of these trusts appeared in the deeds; at the time A. & B. sold to T., one K. had a judgment against both H. & T.; there were other judgments against H., but not against T. After A. & B. conveyed to T., the latter with H. executed to them an obligation reciting the sale, and the fact that the land thus sold had been levied on under the execution against H., and promising to pay A. & B. five thousand dollars if they did not return the land free of incumbrance to them; it was agreed between C. & H. that one G. was to sign this obligation, but he did not do so; the land being about to be sold under the execution of K., A., H., B. & C. filed their bill for an injunction, and a cancelment of the deed from A. & B. to T.; it was averred in the answer of T., and proved by the deputy sheriff, that the object of the sale by A. & B. to T., was to subject the land conveyed to the execution of K., and thus procure time by the valuation law being taken; H. however testified that the title had been made to T., because H. had other judgments against him, under which a levy might be made on the land. *Held*, that it was not sufficiently proved that the object of the sale by A. & B. to T., was to delay K. in his effort to collect his debt, and that the deed to T. should be annulled; the title revested in A. & B., and K. perpetually enjoined from levying on the land. *Taylor* v. *Strong*, 63.

4. Nor would the fact when the execution of K. was levied on the land as the property of T., and it was advertised for sale accordingly, that C., on being informed of the proposed sale expressed his willingness thereto, affect C.'s right to relief against the execution of K.; it would be otherwise if a sale with C.'s tacit or express acquiescence had actually taken place, and K. had paid money or involved his credit in the purchase. *Ib.*

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5. In a trial of the right of property in slaves the claimant relied on his purchase of the slaves under a deed of trust given by the defendant in execution, to secure him from loss in consequence of his suretyship for the defendant in execution. The court below, after having instructed the jury that the deed of trust was *prima facie* good and valid, instructed them that it rested with the claimant to prove the consideration of the deed of trust to be *fair* and *bona fide*, and to show clearly that he was liable for the payment of the debts named in the deed of trust, as surety for the defendant in execution; it was *held*, that this latter instruction was erroneous, because it implied that the plaintiff in execution had made out a *prima facie* case of fraud, with reference to the deed of trust; the court should have added the qualification, "if the jury believe from the evidence that a *prima facie* case of fraud has been made out, then the claimant must prove," &c.

Gilliam v. *Moore*, 130.

6. It is the peculiar province of the jury to pass upon questions of fraud in fact; it is, therefore, erroneous for a court to predicate instructions to the jury, based upon the existence of fraud in fact, without informing the jury that it is for them to judge whether fraud exists. *Ib.*

7. It was held, therefore, to be erroneous, and to be instructing the jury as to the weight of evidence, to instruct them in an issue to try the right of property where the claimant claimed under a deed of trust, that the deed of trust was not of itself evidence that the claimant was bound as surety in the mode in which the deed recited him to be bound, or that the defendant in execution was indebted to the claimant, as recited in the deed, but they must look to the other proof to establish those points. *Ib.*

8. Where an instruction is erroneous, as assuming that fraud in fact exists, the error will not be cured because the record contains proof that seems to make out a case of fraud; the jury have a right to pass on the question, and it is neither for the court below, nor for the high court of errors and appeals to preclude them from that inquiry. *Ib.*

9. No one can hold an interest obtained through the fraud of another, any more than if the fraud were committed by himself; by receiving and retaining a benefit procured for him by the representations of another, he is bound by those representations. *Bowers* v. *Johnson*, 169.

10. A judgment obtained by fraud and collusion, between one not a party to the record and the defendant, predicated upon a forged note of the defendant to the apparent plaintiff, who is a real person, but does not participate in the fraud, is fraudulent, and a nullity and all proceedings under it are of the same character. *Humphries* v. *Bartee*, 282.

11. T. being indebted to B. for borrowed money, conveyed certain slaves, by absolute bill of sale, to B., to secure the debt; these slaves were afterwards sold at public auction, by agreement between T. and B., and bought by B.; afterwards by collusion between H. and T., a judgment for a large sum was obtained in favor of one R., who was a non-resident, against T., in a diffe-

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rent county from that of T.'s residence, upon a forged note of T.'s, for a debt not owing, and the suit brought without the knowledge of R.; H. pretending to be the assignee of this judgment, levied an execution on the slaves in the hands of B., who gave bond to try the right of property. On the trial, T., being admitted as a witness, testified, that the sale of the slaves to B., was fraudulent, upon which the jury found the slaves subject to the execution against T.; and they were sold under it, and bought by H; B., afterwards finding that the judgment under which H. claimed, was fraudulent, and that the whole proceeding had been conducted by fraud and collusion between H. and T., filed his bill to vacate the sale of the slaves to H.; *held*, these facts being made apparent, that the original judgment was void, and the proceedings under it void, and no title passed to H. by the sale under it. *Ib.*

12. No creditor but one who has a lien by judgment, or otherwise, can attack a sale and transfer of personal property as fraudulent; the right of the owner to sell is indisputable if no fraud mingle in the transaction; it is not necessary that the lien should exist at the time of sale; if it be subsequently acquired on a debt that existed at the time of sale, the latter may be attacked. *Hilzheim* v. *Drane*, 556.

13. Therefore in an action of replevin, it is not competent for the defendant to show himself a creditor by bill of exchange of the person who sold the thing sued for to the plaintiff, with the view of attacking that sale as fraudulent. *Ib.*

14. Where a creditor, whose claim has not yet been reduced to judgment, supposes his debtor has made a fraudulent disposition of his effects, he has no right to seize and hold the property thus transferred, by way of getting a security for his debt. *Ib.*

See *Surety*.

GARNISHMENT.

1. A judgment-debtor is subject to the proceeding by garnishment at the suit of a judgment-creditor of his own judgment-creditor.

O'Brien v. *Liddell*, 371.

2. A garnishee summons against a defendant residing in a different county from that in which the judgment on which it issues is rendered, is, under the act of 1842, p. 140, properly returnable to the circuit court of the county where the garnishee resides. *Ib.*

3. Where the answer of a garnishee is contested, the statute (How. & Hutch. 558, § 12,) authorizes a trial by jury, and dispenses with the formality of pleading. If a party summoned as garnishee answer denying his indebtedness, but does not move for his discharge, he is in court until the final disposition of the case, subject to have his answer contested; and where his answer has been contested, and a judgment rendered against him, and he

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moves for a new trial, his opinion that he had been discharged on his answer will not excuse his neglect in preparing for the issue. *Ib.*

4. Where a judgment-debtor is garnisheed as a debtor of his judgment-creditor, and the fact of indebtedness is in issue, the judgment against the garnishee makes out a *prima facie* case against him, and if he has discharged it he must show it. *Ib.*

GUARANTY.

1. An engagement, as surety for a particular person, relates exclusively to the acts of that person, and will not extend to another; and the terms of a guaranty must be strictly followed. *Dick* v. *Crowder*, 71.
2. Therefore, where J. B. C. guaranteed to D. the punctual payment of any drafts drawn by R. D. C. on D.; and R. D. C. and J. J. C. jointly drew a draft on D., it was *held*, that this draft was not within the specific terms of J. B. C.'s guaranty; and he would not be bound for its payment. *Ib.*
3. A guaranty, given upon a settlement of accounts which had been disputed, contains a sufficient consideration; where, therefore, J. B. C. guaranteed the payment of R. D. C.'s drafts on D.; and R. D. C. and J. J. C. *jointly* drew on D.; and R. D. C. also individually drew on D.; and upon a settlement of accounts between D. and J. B. C., the latter executed his individual note to D., for the balance due on his own account, and also on the joint draft of R. D. C. and J. J. C., and the individual draft of R. D. C.; and subsequently J. B. C., by an agreement with D., arranged this note, by having the account of R. D. C. and J. J. C., deducted out of it for the amount of their joint draft, and of R. D. C.'s individual draft, and after paying the residue of the note, executing his guaranty to pay the amount of R. D. C. and J. J. C.'s joint and separate drafts; it was *held*, that the latter guaranty had a sufficient consideration to uphold it, even though *originally* J. B. C. were not bound on his first guaranty for the joint draft of R. D. C. and J. J. C. *Ib.*
4. Where J. B. C., having given D. a guaranty to pay the drafts of R. D. C. on him, took up the balance due by R. D. C. to D., for drafts thus drawn on D., by executing his individual note to D., afterwards procured D. to take his (J. B. C.'s) guaranty of the payment by R. D. C. of the latter's account to D., instead of the note; it was held, that the liability of J. B. C. to D., having thus become *secondary*, where it was formerly *primary*, was a sufficient consideration to the second guaranty. *Ib.*

GUARDIAN AD LITEM.

If minor heirs answer by a guardian *ad litem*, and the chancellor receive the answer of the guardian, as such, for them, the high court of errors and

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appeals will presume that the guardian had been regularly appointed for the purpose, though no order to that effect appear in the record below.
Williams v. *Stratton*, 418.

GUARDIAN AND WARD.

1. Under the statute of this state, which authorizes a foreign guardian whose wards have estates in this state, to apply to the probate court, having jurisdiction, and file a certified copy of his letters of guardianship under the seal of the court granting the same, which provides that upon the guardian's giving bond as required the court shall grant him all the rights and privileges exercised by other guardians, a guardian who has complied with the statute may prosecute, in this state, an action for the use of his wards against the surety of a former guardian on his guardianship bond, given in another state, and payable to that state, the suit to be brought in the name of such state for the use of the guardian.
Hines v. *The State of North Carolina*, 529.
2. On the death of a father without having appointed a testamentary guardian, his widow, under the statute, (H. & H. 336) has the first right to be guardian of the estate of his children; yet if the widow marry again, and her husband, who has taken out letters of guardianship, resign the trust, it will be regarded as a relinquishment of the right on her part; and the next of kin to the deceased, if qualified, and he apply, is next entitled to the letters.
Spaun v. *Collins*, 624.
3. In judging of the qualification of the applicant for guardianship, great discretion is necessarily allowed to the probate court; yet, if the next of kin be an applicant, and be admitted to be qualified, the court must prefer him to a stranger; and if letters of guardianship have been already granted to a stranger, though at the instance and on the petition of the husband of the mother, yet, on the application of the next of kin for the guardianship, it is the duty of the probate court to remove the stranger, and appoint the next of kin, where the children are under fourteen. *Ib.*
4. The appointment of guardians is a matter so peculiarly within the discretion of the probate court, that it will be difficult to interfere with its appointment. *Ib.*
See *Legacy*.

HANCOCK COUNTY SEAT.

1. The legislature, having previously located the county seat of Hancock county, elsewhere, in the year 1846, passed a law, by the first section of which, it was provided, "that the seat of justice was thereby made permanent, and located in the town of Gainesville." The other sections contain provisions, that the citizens of Gainesville should erect, at their own expense, suitable public buildings, one-third of the cost of which, should be refunded to them, &c.; and the seventh section provided the period at

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which all the officers of the county should remove their books and papers to Gainesville; *held*, that by this act of the legislature, the seat of justice was absolutely established at Gainesville, dependent on no condition that the citizens should erect the public buildings at their expense; and that the act was constitutional. *Monet* v. *Jones*, 237.

2. The fact, that the legislature has at one session established the seat of justice of a county, does not at all militate against the validity of an act establishing a different place for the seat of justice, at a subsequent session; it is a subject at all times under legislative control and discretion. *Ib.*

HIGH COURT OF ERRORS AND APPEALS.

See *Practice.*

HUSBAND AND WIFE.

1. A wife has not such an interest in the personal estate of her husband, as that an absolute and irrevocable, though merely voluntary deed thereof, executed by him to his children, even by a former marriage, can be considered a fraud on her rights; nor will it be set aside at her instance.

Cameron v. *Cameron.* 394.

2. Therefore, where C. executed a deed of trust on personal property to M., as trustee for the use and benefit of C.'s two sons, and reserved to himself the possession and control of the property during his own life; it was *held*, that the deed of trust, though voluntary, was absolute and irrevocable, and was not therefore a will in disguise; and that on the death of C., his widow was not entitled to any interest in the estate conveyed by the deed of trust. *Ib.*

3. And this rule applies, whether the purchase of the incumbrance be by the vendee or his wife; there is such an identity between them, that what under such circumstances cannot be done by the husband, cannot be done by the wife; to permit the wife to purchase when the husband is forbidden, would be a mere evasion of the rule. *Hardeman* v. *Cowan*, 486.

4. H. bought of C. a tract of land in this state for $3,600, in November, 1841; there were then judgments against C. for about $1,000; and it was part of the contract of sale that H. should pay by the first of January, 1842, $600 towards these judgments, and the remainder of the purchase-money in three equal annual instalments, from March 1, 1842, when C. was to make H. a deed; H. was put, at the time of sale, in possession of the land; and C. left this state for Tennessee, where he lived; early in December, 1841, the land was sold under two of the judgments against C. at different times, and bought by L. H. for $375; L. H. was the brother of H.'s wife, and bought for her benefit and for her, advancing his own money for the purchase, but buying exclusively for his sister; H. paid the $600 at the stipulated time, and C. made him a deed which H. refused to receive on the ground that C. could not make him a title, by reason of the previous sale to L. H. *Held*, that the purchase by L. H. was in reality a purchase by the wife of H.;

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that H.'s wife could not set up her title thus acquired against the vendor of her husband; and that the land was subject to the payment of the residue of the purchase-money due C. after the repayment of the money to L. H. advanced by him. *Ib.*

5. A married woman cannot part with her separate property in any other mode than in that which is pointed out by the deed of settlement; if that prescribe a different mode from the one established by the statute for the transfer of her estate, the mode designated in the deed of settlement *must be followed;* it will not be sufficient to pursue the statute, if it differ from the deed of settlement; it is the latter, in such case, and not the former, which confers the power. *Montgomery* v. *The Agricultural Bank*, 566.

6. Where a marriage contract was entered into, by which the separate property of the wife and its proceeds were secured to her free from the control of her husband, and the mode of alienation of her property pointed out by the contract; and, afterwards, the husband bought other property with the proceeds of the wife's separate property, and took the title by mistake in his own name, but on discovery of his mistake, conveyed the property by deed of trust to a trustee, and, in the deed of trust, recited the facts and gave the same power and control over the property that she possessed before marriage; it was *held*, that the deed of trust must be construed in connection with the marriage settlement, in order to ascertain the wife's power over the property conveyed by it; she could not aliene or dispose of the property embraced in the deed of trust in any other mode than that designated in the marriage contract; and she might have enforced, had she been so disposed, a *legal title* in herself to the land embraced in the deed of trust, and held it as she held her other property under the marriage contract. *Ib.*

7. Where, therefore, under the marriage contract, the wife's power to aliene was declared to be by deed signed by her, attested by two witnesses in her presence, and by her request; and she, in conjunction with her husband and the trustee in this subsequent deed of trust, executed a mortgage on the property embraced in the deed of trust, to secure a debt of her husband; and the mortgage was executed and acknowledged only in the ordinary mode; it was *held*, that it did not bind the wife's property embraced in the deed of trust, and could not be enforced against it. *Ib.*

8. Where the first clause in a deed of marriage settlement gave the wife the power of disposition of her separate estate, and the second clause pointed out the *mode* of disposition; it was *held*, that the two clauses were not inconsistent with each other. *Ib.*

INDIAN.

See *Chickasaw Treaty.*

INDICTMENT.

See *Criminal Law.*

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INFANT.

A decree of the chancery court, in relation to the realty of minors, which contains no saving clause as to their rights or arrival at age is erroneous; but the decree being regular in other particulars, the high court of errors and appeals will protect the minors' rights by decree in that court.

Williams v. *Stratton*, 418.

INJUNCTION.

A *supersedeas* is not the proper remedy for the violation, by a plaintiff in execution, of an injunction against the issuance of the execution; an attachment for contempt of the injunction is the remedy.

Commercial Bank of Manchester v. *Waters*, 559.

INSOLVENT ESTATES.

See *Executor and Administrator;* title to realty in them when estate declared insolvent, and may sue for.

INSTRUCTIONS.

1. All the instructions given by the circuit court on the trial of a cause must be construed together; and if, when taken altogether, the law be correctly given, the judgment will not be reversed because a single instruction taken by itself, might be too broad in its terms. *Childress* v. *Ford*, 25.

2. Charges must be given with reference to the evidence before the jury, they must be applicable to the state of case made out. *Payne* v. *Green*, 507.

3. It is right that the jury should have the law explicitly laid down to them; and if the court below refuse an instruction which is the law and applicable to the case, the high court of errors and appeals will reverse the judgment notwithstanding the circuit court may have given other instructions from which inferentially, by mere inference of law, as a consequence, the proposition of law embodied in the refused instruction, might have been drawn. *Ib.*

See *Fraud, Criminal Law.*

INTEREST.

See *Usury.*

JOINT TENANT.

See *Forcible Entry and Detainer*, one of many may maintain.

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JUDGMENT.

1. Where an execution was returned by the sheriff, "*money not made;*" but no indulgence on the part of the plaintiff in execution appeared, or negligence in the management of his execution, it was *held*, that the mere omission of the sheriff to do his duty, whereby he made himself liable for the debt to the plaintiff in execution, would not postpone the lien of the plaintiff's judgment. *Banks* v. *Evans*, 35.

2. How far the vendor's equitable lien will prevail against a judgment creditor of the vendee, whose judgment was older than the sale from the vendor to the vendee, — *Quære*. *Taylor* v. *Strong*, 63.

3. On overruling a demurrer to a plea to one count of a declaration, it is error to give judgment on the whole declaration in favor of the defendants; the plaintiff might establish his case under the second count against them. *Deut* v. *Coleman*, 83.

4. It seems, where there is a judgment against a party, and he purchases real estate on a credit, and subsequently gives a deed of trust thereon, to secure the payment of the purchase-money, that the lien of the judgment will be paramount to the vendor's lien or that of the deed of trust; and the real estate thus purchased, will be liable to sale under the judgment. *Baine* v. *Williams*, 113.

5. A court of equity has jurisdiction to enjoin a sale under execution at law, on the application of an equitable incumbrancer, who has a prior equitable lien, to the lien of the judgment; and when the court has taken cognizance of the matter, it will adjust all the rights of the parties. *Parker* v. *Kelly*, 184.

6. The several states of the Union are each sovereign and independent, and their relations are those *of foreign states in close friendship*, in regard to all matters not surrendered to the general government; and but for the acts of congress, the judgments of each state would be regarded as foreign judgments in every other. *Dorsey* v. *Maury*, 298.

7. The judgments of the courts of the United States, must be construed to be embraced in the acts of congress, as to the authentication of judgments, or they must be esteemed as foreign judgments; in either case, the judgment must be properly authenticated. *Ib.*

8. By the act of 1844, regulating the liens of judgments and decrees, it is provided, in the 6th section, that judgments thereafter or theretofore rendered shall cease to be liens unless entered on the "judgment roll," when the lien shall be from the enrolment; by the 14th section it is provided that the act shall not operate upon judgments theretofore rendered until after the first of July, 1844, nor upon those thereafter rendered until sixty days after its approval; *held* to be the true construction of the act; that all judgments rendered before the act, or within sixty days after its approval, if enrolled at any

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time before the first day of July, 1844, retained the order of priority which appertained to them before its approval, and derived no priority from an earlier date of enrolment prior to the first day of July, 1844.

Wyatt v. *Beatty*, 463.

9. Where two judgments were obtained on the same day, against the same defendant; prior to the enrolment law of 1844, and both enrolled, but on different days; and on the judgment latest enrolled the plaintiff had an execution issued and made some money; *held*, that the execution on which the money was made was entitled to it. *Ib.*

See *Execution*, *passim*. See *Vendor* and *Vendee;* when judgment, lien on equitable interest. See *Chancery;* when judgment void. See *Res Adjudicata;* first judgment conclusive.

JURISDICTION.

Where there is an entire want of jurisdiction of the subject-matter in the court, it is never too late, even in the high court of errors and appeals, to object to the jurisdiction of the court; it is only in cases of concurrent jurisdiction that a demurrer to the jurisdiction of the court is requisite.

Green v. *Creighton*, 159.

JURY.

1. The sanctity of the trial by jury requires that the jurors should be impartial and unbiased, and if it is afterwards ascertained that they were not so, the verdict should be set aside. *Childress* v. *Ford*, 25.

2. Where, therefore, in a trial of the right of property to slaves, levied on under execution, one of the jurymen had stated, previously to the trial, that the sale from the defendant in execution to the claimant was fraudulent, and the slaves should be made liable to the execution: and on the impanelling of the jury, the jurors were asked if they had formed and expressed opinions against the validity of the claimant's rights, and they had all answered in the negative; and the claimant made oath that he was ignorant until after the trial, of this expression of opinion by one of the jurors; it was *held*, that the verdict should be set aside and a new trial granted. *Ib.*

3. A different rule would perhaps prevail if the party chose to go to trial without examining the jurors. *Ib.*

See *Fraud.*

JUSTICE OF PEACE.

In a suit before a justice of the peace, the only thing he has to determine is, the question of indebtedness, without regard to the technical form of the action. His is not a common law court. *Stier* v. *Surget*, 154.

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LANDLORD AND TENANT.

1. Where the lessor sought to recover on an express agreement to pay rent, it was held to be immaterial whether the lessee occupied or not. At common law, an action of assumpsit may be sustained on an express agreement to pay rent, and the occupancy of the defendant is then immaterial.

Stier v. *Surget*, 154.

2. Where the plaintiff claimed twenty dollars for rent of a house and lot, and obtained a judgment therefor, and the defendant, on a motion for a new trial, admitted that he owed twenty dollars for the ground-rent of the lot alone, but claimed to own the house himself; it was held, that the *merits* were obviously with the plaintiff, and that the ownership of the house, had nothing to do with the rights of the parties in the suit;—a party might, under certain circumstances, become liable for the rent of his own house. *Ib.*

See *Forcible Entry and Detainer.*

LEGACY.

1. The remedy to enforce the right of creditors to pursue the estate of the testator in the hands of the legatees, after the executor or administrator has assented to the legacies, is in equity to compel them to refund.

Turner v. *Chambers*, 308.

2. T. administrator *de bonis non*, *c. t. a.*, of B., deceased, who had paid certain debts of the testator out of his individual funds, filed his petition in the probate court to subject certain slaves specifically bequeathed, to the payment of the sum advanced by him, they being the only assets left; by his petition he showed that he was guardian of the legatees, and that the slaves bequeathed were in his possession as guardian; that as guardian he employed their services for the maintenance of the legatees, and that a former guardian of the legatees had inventoried the slaves as the property of the legatees; *held*, that the slaves thus in the guardian's hands, would not even be subject to a *fieri facias* against the administrator, and his petition was properly dismissed. *Ib.*

LEVY.

See *Execution; Forthcoming Bond.*

LIEN.

1. As a general rule, a mere change in the form of the evidence of indebtedness, will not operate to discharge a lien given to secure the debt, unless it is apparent that the parties intended to extinguish the lien; while the *debt* exists the lien lasts. *Lewis* v. *Starke*, 120.

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2. A lien cannot be displaced but by some act of the party holding it, which shall postpone him to a subsequent claimant. *Parker* v. *Kelly*, 184.

See *Chancery; Executor and Administrator.*

LIFE ESTATE.

See *Will.*

LIMITATIONS, (STATUTE OF.)

1. If a debt is due, and the statute of limitations has commenced running, before the death of the debtor, it is not suspended by his death, until administration is taken out upon his estate; but if the debt was not due at the time of his death, the statute does not begin to run until there is administration, because until then a cause of action has never accrued.

Abbott v. *McElroy*, 100.

2. The statute of limitations is suspended during the first nine months after administration granted, because in that period, no suit can be maintained against the administrator. *Ib.*

3. B. bought a tract of land of J., and took the latter's bond to make title when the purchase-money was paid; in May, 1838, B. assigned certain notes to J. on account of the purchase-money, and agreed that he would be bound for the same upon the failure of the makers; in November, 1840, R. at the request of B., applied to J. for a deed to the land; it was refused, because the purchase-money was not paid; R. told J., if he failed to collect the notes, B. was good, and would certainly pay it to him; upon which J. made the deed, and took up his title bond; in September, 1845, J. sued B. for the residue of the notes unpaid; B. relied on the statute of limitations of six years: *held*, that R.'s promise to J. was clearly a waiver of the statute, and that, even though R. had no authority to make the promise, yet, if B. retained the deed and the land thus acquired, the promise would be obligatory upon him. *Bowers* v. *Johnson*, 169.

MARRIAGE SETTLEMENT.

See *Husband and Wife.*

MARRIED WOMEN.

See *Husband and Wife.*

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MARSHALLING ASSETS.

See *Chancery*.

MECHANIC'S LIEN LAW.

1. The lien afforded by the statute of 1840, entitled, "an act to reduce into one the several acts and parts of acts for the benefit of mechanics," can only be claimed by those who bring themselves strictly within its provisions. *Jones* v. *Alexander*, 627.

2. The statute provides that the suit must be brought within twelve months from the time the money was to be paid, in order to secure the lien; and if it be not brought within that period, it cannot prevail. *Ib.*

3. Where, therefore, J. and others furnished lumber to A. for a house in the year 1844, the proper time for the payment of which was on the first day of January, 1845; and on the 6th day of May, 1845, A. executed his note for the amount due for the lumber, payable one day after date; and on the 7th day of April, 1846, J. and others filed their petition to enforce their lien on the house for the lumber sold, it was *held*, that the petition could not be maintained, not being brought within twelve months from the time the payment was to be made; the parties could not, subsequently to their original contract, change the time of payment fixed by that contract, and yet enforce the lien under the statute. *Ib.*

MERGER.

1. A prior equity generally sinks or merges in a subsequently acquired legal title, unless there be some declared intent to prevent it or some beneficial purpose to the holder, not inconsistent with the rights of others; a court of equity will keep alive an incumbrance, or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party; so the purpose be innocent and injurious to no one. *Lewis* v. *Starke*, 120.

2. S. accepted certain bills of exchange for M., and took a deed of trust on the slaves of M. for his indemnity; the first of these bills S. paid, but instead of enforcing the deed of trust as he might have done, he took of M. a note for the amount, payable to himself, and indorsed it to a bank, which was still the holder of it. *Held*, that S. could not subject the slaves to the payment of this note; by taking M.'s note he either extinguished the deed of trust, or, if not, he transferred that lien with the note to the bank, in which, if anybody, the right rested to enforce the lien. *Ib.*

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3. M. gave S. a deed of trust on slaves to indemnify S. for certain accommodation acceptances for M. held by B.; B. being in debt to the Merchants' Bank, M. by arrangement with B. executed his five notes to the bank, and took up the bills of exchange in settlement of B.'s debt to the bank, and gave the bank a deed of trust on the same slaves, to secure the notes thus given. After this, S. bought these slaves of M., and agreed, in payment of them, to take up M.'s five notes to the bank, and did, by an arrangement with the bank, execute his own notes to the bank in lieu of those of M. and procured an order for their delivery by the agent of the bank which held them for collection to M. and delivered it to him; these slaves thus in S.'s possession were levied on under execution against M., older than the sale to S., and older than the deed of trust by M. to the bank, but younger than the original deed of trust to secure S. as accommodation acceptor; S. filed a bill to enjoin the sale under these executions, and to have the original deed of trust set up between the judgment creditors and the slaves; *held*, that the bill could not be maintained by S.; that if the original deed of trust were not extinguished by the execution of the notes by M. to the bank, neither was it by the execution of the notes by S. to the bank to take up those of M.; and the bank was the party entitled to the benefit of the lien; and S., therefore, could not enforce it, as he could not protect himself under an equity of the bank, which might never be asserted by the bank. *Ib.*

4. Where a man buys incumbered property, and agrees to pay off the incumbrance for the purchase-money, and does pay it off, it seems the incumbrance is thereby extinguished and he cannot afterwards set it up and keep it alive for his own protection, when no such intention was manifested at the time. *Ib.*

5. Where a deed of trust on slaves was executed by M. to secure S. against loss as accommodation acceptor for M., and M. afterwards took up the bills thus accepted by S., by executing his own notes to the holder of the bills, and secured their payment by a deed of trust on the same slaves; which deed of trust the holder refused to take, unless M. would procure the release of another incumbrance junior to the original one to S., which was done; it was held that the arrangement between M. and the holder of the bills showed an intention to abandon and relinquish the lien of the original deed of trust, and look only to the one directly to the holder; and the original deed of trust was, therefore, extinguished by the execution of the new notes and deed of trust. *Ib.*

See *Chancery*.

MORTGAGE.

1. Where slaves were conveyed by an absolute bill of sale to the vendee, but in reality, merely as a mortgage, to secure a debt due by the vendor, and

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judgments are subsequently rendered against the vendor, and the vendee seeks relief in equity against executions on these judgments, the proper remedy is, to decree a sale of the slaves, and order the proceeds to be appropriated first to the satisfaction of the mortgage-money, the amount of which is to be ascertained by an account; and, second, to the payment of the judgments, in the order of their priority, excluding such judgments as are not recorded in the proper county, according to the statute; if he desire it, the vendee may redeem from judgment creditors of the vendor.

Humphries v. *Bartee*, 282.

2. An absolute bill of sale, designed however between the parties as a mortgage, if delivery of the thing sold accompany the bill of sale, need not be recorded to be valid as against subsequent judgment creditors of the vendor. A court of equity, in treating it as a mortgage, will protect the rights of the vendee; the possession by the vendee, was equivalent to notice of registration, even if it had been competent to record an absolute bill of sale. *Ib.*

3. Where an administrator brought an action of replevin, to recover slaves of his intestate, and the defendant set up that he held them under an agreement with the intestate, that he should do so until a debt the intestate owed him should be paid out of their labor and services, and the jury found for the defendant; it was *held*, that their verdict would not preclude the administrator from a proceeding in chancery, to ascertain what sum was due the defendant, and have the matter finally adjudicated. *Fisher* v. *Leach*, 313.

4. The statute (How. & Hutch. 525, § 76,) which directs the mode of procedure upon the sale, by decree of the chancery court, of mortgaged premises, provides, that *bond* with surety shall be taken from the purchaser, which if not paid at maturity, is to have the force and effect of a judgment, and execution may issue upon it; a decree, therefore, which directs, that on the sale of the mortgaged property, a *note* shall be taken for the purchase-money due the complainant, and if there be any surplus, a *note* for that surplus shall be taken, payable to the defendant, is erroneous, and, before a sale under the decree, will, on the appeal of the defendant, be reversed.

Cook v. *Fultz*, 369.

5. A bill of sale of a slave absolute on its face may be shown by parol proof to be a mere mortgage for the security of money due by the vendor to the vendee. *Carter* v. *Burris*, 527.

6. The admission by the vendee that an absolute bill of sale of a slave held by him was not absolute, but the vendor was to have the slave when he paid the vendee the amount due him, coupled with the facts that the vendee did not take possession of the slave until two years after the date of the bill of sale; and that the vendor paid the vendee a part of the sum due him, after the execution of the bill of sale, was *held* sufficient to show that such bill of sale was a mere mortgage for the payment of the money due by the vendor to the vendee. *Ib.*

7. Before an equitable mortgage will be sustained in equity, there must be clear

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and unequivocal proof of the intention to create the mortgage, and the sum which the mortgage is to secure. *Williams* v. *Stratton*, 418.

8. The assignment of a note secured by a mortgage carries the mortgage with it, as an incident of the note, and subrogates the assignee to all the rights of the mortgagee; such assignee therefore requires no special authority from the mortgagee to resort to the mortgage; and if such special authority be given in writing by the mortgagee of a series of notes secured by the mortgage to the assignee of the first of the series, such assignee will have no better right than an assignee by mere indorsement of any other note of the series. *Henderson* v. *Herrod*, 630.

9. It is doubtful whether the mortgagee, who holds a series of notes secured by his mortgage, can change or modify the effect of the mortgage so as to give to his assignee of the first of the series of notes a right to prior satisfaction of such note out of the mortgaged property to the exclusion of the security from the other notes. *Ib.*

10. Where a mortgage was executed to secure three notes falling due at different periods each, and the mortgagee assigned each note for value to different persons, and all the notes had matured, it was *held*, on a bill filed by the holder of the first note of the series to foreclose the mortgage and subject the property to his note, that the holders of all the notes stood upon an equal footing and were each entitled to share ratably in the proceeds of the sale of the mortgaged property. *Ib.*

See *Executor and Administrator*, when deposit of title deeds is an equitable mortgage.

MONTHS.

Does the statute prescribing the length of time in which commissioners of insolvency shall keep the commission open, mean by the word "*months*" lunar or calendar months? *Stewart* v. *Davidson*, 351. *Humphries* v. *Bartee*, 282.

MURDER.

See *Criminal Law*.

NEW TRIAL.

1. B. bought a tract of land of J., assigned in part payment of the purchase-money a constable's receipt for certain notes for collection, and indorsed on the receipt that he would be bound for the same upon the failure of the makers of the notes; J. subsequently sued B. to recover what was yet due on one of the notes embraced in the receipt; on the trial the maker of this note testified that to the best of his recollection he had paid the note to the constable; while the constable testified that he did not recol-

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lect that the maker had paid it to him; there was proof that the maker of the note was insolvent when the constable's receipt was assigned to J., and proof also of the constable's insolvency; the jury found for J. for the full amount of the note; *held*, that the verdict should not be disturbed, where the court below had refused to disturb it. *Bowers* v. *Johnson*, 169.

2. A new trial will not be granted, because the party was ignorant of the legal effect of a record which he relied on as evidence; the fact, therefore, that he was ignorant that the record of judgments of the courts of the United States, must be authenticated, according to the act of congress, and, therefore, went to trial, relying on a record of one of those courts not so authenticated, will be no ground to entitle him to a new trial.

Dorsey v. *Maury*, 298.

3. The high court of errors and appeals will not disturb a verdict, although found contrary to a portion of the evidence, unless it is clearly against the evidence, or the palpable preponderance of it. *Fisher* v. *Leach*, 313.

4. In an action of replevin for certain slaves, the evidence, in some particulars was contradictory; but at least one witness stated, that the plaintiff's intestate delivered the slaves in controversy to the defendant, to be held by him until their services and labor had remunerated the defendant in the amount in which the plaintiff's intestate was indebted to him; on the testimony, the court below instructed the jury, that if they believed these facts, the defendant had the right to the slaves until the debt due to him was paid, and the jury found for the defendant; it was *held*, the court would not disturb the verdict. *Ib.*

5. Where an attorney, who had received a note for collection and had sued upon it, was instructed by his client to withdraw the suit, upon the maker of the note paying his fees, and the maker did so, and the suit was dismissed, and the attorney, at the request of the maker, wrote a letter to the person to whom he had been directed by his client to send the note, in which letter he stated, that the maker of the note had paid the fees to be credited on the note; and, in a subsequent suit on the same note, the maker plead, as an offset, the sum paid the attorney for his fees, and produced the attorney's letter in proof of the offset; and the attorney thereupon testified, that the payment of the fees was the condition on which the first suit was to be dismissed, and was not to be a credit on the note, and that he had written the letter as he did at the instance of the maker of the note; and the jury found the full amount of the note; it was *held*, that the maker of the note was entitled to a new trial, on the ground of surprise at the testimony of the attorney; he had a right to rely on the attorney's letter, as an evidence of the credit, and when the testimony of the attorney reduced an unqualified credit to be a mere condition, he ought to have been allowed the opportunity of meeting (as affidavits showed that he could meet) the change thus produced by the witness in the aspect of the credit, as originally given.

Arthur v. *Mitchell*, 326.

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6. The statute (How. & Hutch. 481, § 8,) authorizes the circuit judge to take, under advisement, in vacation, motions for new trials, and to give his opinion in writing, within a prescribed time, to the clerk; where, therefore, a circuit judge has so taken a motion for new trial, under advisement, and has in the proper time given his opinion in writing, granting the new trial, it is error for the circuit court at its next term to strike the case from the docket; if there were error in the opinion of the judge granting the new trial, the same statute grants the right to except, and take writs of error to such judgment to the high court of errors and appeals.

McClure v. *Houston*, 392.

See *Jury*.

NONSUIT.

1. Under the act of 1840, ch. 74, regulating the practice of the circuit court, power is not conferred upon that court to order the plaintiff to be nonsuited, because he has not joined in an issue presented by the defendant at the first term; and if such a nonsuit be entered by order of the court, it will be error. *Williams* v. *Montgomery*, 321.

2. It seems that, under the act referred to, the circuit courts have power to direct a rule upon the parties to make up the pleadings at the first term, so that they can be passed upon by the court; but not to nonsuit the party before having issued the rule. *Ib.*

PARTIES.

See *Chancery*.

PARTNERS.

1. In this state contracts and liabilities of copartners are joint and several; and any one of the partners may be sued and is liable for the whole indebtedness. *Keerl* v. *Bridgers*, 612.

2. Where, therefore, a firm, consisting of three persons, was sued upon an account, for which it was proved that two of the firm had executed to the plaintiff their note; and the suit was dismissed as to those two, and stood against the third partner alone: it was *held*, that it was a question of fact for the jury to say, whether the note of the other two was received by the plaintiff in extinguishment and satisfaction of the debt of the three; if it were, the third partner would be discharged from the debt; otherwise not. *Ib.*

PARTITION.

1. The probate court has no jurisdiction of a petition for the partition of lands held in coparcenary, joint tenancy, or tenancy in common, except it be for the

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division of the lands of a deceased person amongst his heirs under the statute (How. & Hutch. 412, § 89,) or in case of the *death* of one joint tenant, tenant in common, or coparcener, and the descent of his lands to his minor heirs, under the law of 1833, ch. 46, § 1. *Smith* v. *Craig*, 447.

2. The act of 1833, ch. 29, § 2, which provides "that the powers and jurisdiction heretofore invested in the presiding justices of the county courts by an act entitled 'an act concerning the partition of land held by coparceners, joint tenants and tenants in common,' passed 10th June, 1822, shall pertain to and be invested in the judges of probate of the several counties of this state; and that all matters and proceedings which by virtue of this act were required to be recorded in the clerk's office of the county courts, shall be regularly recorded in the clerk's office of the probate courts of the counties respectively where such proceedings shall be had," confers no power or jurisdiction whatever on the *probate courts;* if conferred at all, it is conferred upon the probate *judge personally*, and if the legislature could give it to him, he has the power to order partition. *Ib.*

PATENT.

See *Chickasaw Treaty.*

PAYMENT.

1. A debtor, who owes his creditor two distinct demands, has a right, in making a payment, to direct its application; if the debtor make no direction, a court of equity will place the credit where it would be most beneficial to the defendant, on the presumption that it was so desired by him; but if there be any direction that it shall be otherwise placed, or if the defendant waive his right to direct the appropriation, a court of equity will not disturb it. *Baine* v. *Williams*, 113.

2. The execution, by the grantor in a deed of trust, of an absolute deed, by which he conveys the property formerly conveyed in trust, absolutely to the *cestui que trust*, is not a *payment of the deed of trust;* the absolute deed only operated to extinguish the grantor's interest; the legal title still remained in the trustee. *Brown* v. *Bartee*, 268.

PERSONAL PROPERTY.

1. In the purchase of personal property, the general rule is that the purchaser buys at his own peril, *caveat emptor*, unless the seller either give an express warranty; or the law imply one from the circumstances of the case, or nature of the thing sold; or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale.

Otts v. *Alderson*, 476.

2. O. bought of A. a slave, and agreed to give for him a full price for a sound

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slave; there was no proof of warranty; the slave at the time had scrofula, and was constitutionally diseased with it; there was no proof that A. knew of the disease, or represented the boy sound. A. sued O. for the purchase-money: *Held*, that he was entitled to recover the full amount, though the slave was worthless. *Ib.*

3. An equity of redemption in slaves is not the subject of execution; a levy, therefore, on such equity, should be set aside.

Commercial Bank of Manchester v. *Waters*, 559.

See *Warranty*.

PLEA.

The want of service or insufficient service of process, is cured by the appearance and plea of the party. *Harris* v. *Gwin*, 563.

PLEADING.

1. Where an administrator, to a petition, seeking to make him liable for the hire of a slave of the estate not accounted for in his accounts, plead that the petitioner was not a distributee of the estate, but afterwards filed an answer to the merits of the petition; it was *held*, that the latter answer waived the former plea. *Price* v. *Mitchell*, 179.

2. Where, to an action on a note, the defendant plead an accord and satisfaction by the sale and conveyance of a tract of land, which the plaintiff accepted and received in discharge and satisfaction of the note, to which plea the plaintiff replied, denying both the conveyance of the land to him, and his acceptance of it, it was *held*, on demurrer to the replication, that it was a good answer to the plea, and was neither double, uncertain, nor objectionable. *Deut* v. *Coleman*, 83.

3. On overruling a demurrer to a plea to one count of a declaration, it is error to give judgment on the whole declaration in favor of the defendants; the plaintiff might establish his case under the second count against them. *Ib.*

4. To an action on a supersedeas bond, the defendants plead performance; the plaintiff replied and assigned, "that the defendant did not prosecute his said supersedeas with effect, nor has he well and truly paid, &c.," but did not aver that a supersedeas had issued: *Held*, that the replication was defective for want of such averment; the defendant had a right to put in issue the existence or issuance of the supersedeas. *Wharton* v. *Porter*. 305.

5. A declaration, which alleges that the defendant and two others, on a day named, made their note, and promised to pay D. or order a certain sum at a time named; and the defendant, after the date of the note, paid it to D. and took it into possession; and, knowing that he had in law discharged it, he, for value received, indorsed and delivered it on a day named, to the plaintiff, contains a sufficient statement of a cause of action against the defendant. *Mabry* v. *Matheny*, 323.

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6. M. being auditor of public accounts, was sued, in assumpsit by the assignee thereof, for value, on this writing: "W. wishes to anticipate his salary from the first of November, 1844, to November 1, 1845; he has discharged his duty faithfully in my office; I shall continue W. in the office until my time expires, which is November 1, 1845, and will issue his pay monthly, as the law allows, *and will pay over to the holder of this obligation* at the rate of eight hundred dollars per annum in treasury warrants." The writing was signed "M., auditor of public accounts;" the declaration averred as a breach, that M. had not paid the eight hundred dollars, but did not aver, that W. had performed the services: *Held*, that the declaration was fatally defective. *Copes* v. *Matthews*, 398.

7. In the declaration, filed by a guardian, the allegation that the suit was brought "by order and direction of the court of pleas and quarter sessions for the county of Nash and state of North Carolina" may be treated as surplusage; the declaration elsewhere showing the guardian's right by virtue of his proceeding in the probate court of this state.

Hines v. *The State of North Carolina*, 529.

See *Escrow*, *Sureties*.

PRACTICE.

1. Where in an action against the treasurer of the state for defalcation in his office, there was a verdict rendered by the jury on his official bond against him and his sureties for the amount shown to be due by him, and the bill of exceptions did not show what kind of funds were received by the treasurer, nor from what source they were received, it was *held* that this court would not inquire into the question whether the funds were received by the treasurer in pursuance of law, or not. *Graves* v. *Tucker*, 9.

2. A decree having been rendered in the court below upon a *pro confesso* taken on the overruling the demurrer, directing the defendant to deliver up the slaves to the complainant, the defendant, on appeal to the high court, sought to have a decision as to his claim in right of his wife, and also his claim to a proportion of the profits of the slaves until the period of division; it was *held*, that those points not having been raised by answer or cross-bill in the court below, could not be adjudicated by the high court; but that the defendant was not precluded from asserting otherwise any rights he might have to the profits of the slaves. *Ferguson* v. *Applenhite*, 301.

3. Under the act of 1840, ch. 74, regulating the practice of the circuit court, power is not conferred upon that court to order the plaintiff to be nonsuited, because he has not joined in an issue presented by the defendant at the first term; and if such a nonsuit be entered by order of the court, it will be error.

Williams v. *Montgomery*, 321.

4. It seems, that under the act referred to, the circuit courts have power to direct a rule upon the parties, to make up the pleadings at the first term, so

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that they can be passed upon by the court; but not to nonsuit the party before having issued the rule. *Ib.*

5. If mesne process be not executed at least five days before the return day of the writ, and objection thereto be not made in the court below, it cannot be entertained in the high court of errors and appeals; and it seems that such objection can only be taken in the court below by plea in abatement to the writ. *Thornton* v. *Fitzhugh*, 438.
6. If the return term, to which mesne process has been executed fail, so that no court is held at that term, such term will nevertheless constitute the appearance term of the case, which will stand for trial at the next term in the same way as though the appearance term had been regularly held. *Ib.*
7. Under the imparlance law of 1840, the return term of the writ and the return term of the action is that term wherein the writs in the action are all returned served, or at which all the parties have entered an appearance. *Ib.*
8. Objections not made in the court below will not be heard in the high court of errors and appeals; and defects not pointed out by adverse counsel at the trial below, will be considered as having been waived. *Rabe* v. *Fyler*, 440.
9. A party is not confined to any particular order in the introduction of his testimony; but when he offers testimony, and it is excluded, and he excepts to the exclusion, it must be shown affirmatively during the progress of the trial, that the testimony offered and excluded was relevant and pertinent. *Torrey* v. *Fisk*, 590.
10. The high court of errors and appeals seldom entertains objections not made in the court below; yet, where testimony was offered below, and, on objection made, excluded, if the exclusion were proper, it will not reverse the cause because the judge below assigned an insufficient reason for its exclusion. *Ib.*

See *Amendment*. See *Contempt*. See *Pleading*.

PREEMPTION.

1. A note given to a person occupying public land, with the purpose of becoming a *preëmptor*, under the act of congress of June 22, 1838, for the purchase of the land from such occupier when his right of preëmption is perfected — to perfect which, the occupier agrees to occupy the land the prescribed time, and take the required steps, and then convey the title to the purchaser — is given for an illegal consideration, is in violation of the preëmption act referred to, and is void. *Brown* v. *Poindexter*, 596.
2. And if the maker of the note suffer a judgment at law to be rendered against him on the note, he cannot afterwards obtain relief against the judgment, in equity, on the ground that the intended preëmptor, by his negligence, which occurred after the judgment at law, lost his preëmption; the note being void, the defence at law was good, whether the other party carried out his contract, or not. *Ib.*

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PRINCIPAL AND SURETY.

See *Surety*.

PROBATE COURT.

1. The act of 1846 (sheet acts, p. 144,) which provides for the issuance of attachments to enforce the decrees of the probate court, introduces no new remedy in that particular; such a power has long belonged to that court. *Vertner* v. *Martin*, 103.

2. It seems that the power given by that act (of 1846) to the probate court, in some cases to issue a *fieri facias*, is a new remedy. *Ib.*

3. The statute of 1846, which gives the probate court the power to entertain bills of review of its own decrees and judgments, has no retrospective operation, so as to allow it to entertain a bill to review a decree of the court rendered prior to the passage of that act. *Stewart* v. *Davidson*, 351.

4. Where, therefore, a bill of review was filed in 1846 by a creditor of an estate, to review the judgment of the probate court, rendered in the year 1844, confirming the final report of the commissioners of insolvency on that estate, in which the creditor who sought the review was not included, and the order appointing commissioners was made on the 14th of December, 1843, directing them to keep the commission open *six months*, and they reported on the 13th of June, 1844, and their report was then allowed; it was *held*, that the judgment of allowance, being on a matter within the jurisdiction of the court, was final and conclusive under the laws of this state at the time it was rendered, unless reversed by the high court of errors and appeals, and was a bar to claims not allowed therein; that rights had been acquired under it; the legislature had no power to prescribe a mode by which a judgment thus made final by existing laws, could be opened or reversed; and the bill of review must be dismissed. *Ib.*

5. The probate court has no jurisdiction of a petition for the partition of lands held in coparcenary, joint tenancy, or tenancy in common, except it be for the division of the lands of a deceased person amongst his heirs under the statute (How. & Hutch. 412, § 89,) or in case of the *death* of one joint tenant, tenant in common, or coparcener, and the descent of his lands to his minor heirs, under the law of 1833, ch. 46, § 1. *Smith* v. *Craig*, 447.

6. The probate court has no jurisdiction, and can have no jurisdiction, except it falls under either one or the other of the heads of jurisdiction conferred by the constitution, matters testamentary and of administration in orphans' business and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compotes mentis*. *Ib.*

7. The act of 1833, ch. 29, § 2, which provides "that the powers and jurisdictions heretofore invested in the presiding justices of the county courts by an act entitled 'an act concerning the partition of land held by coparceners,

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joint tenants and tenants in common,' passed 10th June, 1822, shall pertain to and be invested in the judges of probate of the several counties of this state; and that all matters and proceedings which by virtue of said act were required to be recorded in the clerk's office of the county courts, shall be regularly recorded in the office of the clerk of the probate courts of the counties respectively where such proceedings shall be had," confers no power or jurisdiction whatever on the *probate courts;* if conferred at all, it is conferred upon the probate *judge personally*, and if the legislature could give it to him, he has the power to order partition. *Ib.*

8. The probate court had no jurisdiction, prior to the act of 1846, (Acts 1846, p. 144,) to set aside a settlement made by a guardian or an executor, at a term subsequent to that at which the decree was made; the act of 1846, providing a remedy in the probate court for that end is prospective entirely in its operation, and does not apply to any settlement made prior to its passage. *Hooker* v. *Hooker*, 599.

9. The operation of a law must always be prospective, unless the contrary intention is manifest, even where the legislature had power to give it a retrospective effect. *Ib.*

10. It seems, that to give the law of 1846, referred to, a retrospective effect, and permit judgments and decrees, final and conclusive according to the then existing law, to be opened and inquired into under that law, would be in violation of the constitution. *Ib.*

See *Chancery*, for jurisdiction over decree in probate court. See *Guardian and Ward*, for discretion in appointing.

PROBATE CLERK.

See *Executor and Administrator;* payment to, not valid.

PROCESS.

If mesne process be not executed at least five days before the return day of the writ, and objection thereto be not made in the court below, it cannot be entertained in the high court of errors and appeals; and it seems that such objection can only be taken in the court below, by plea in abatement to the writ. *Thornton* v. *Fitzhugh*, 438.

PUBLIC OFFICER.

1. In the ordinary course of things an agent, contracting in behalf of the government, or of the public, is not to be presumed to have bound himself personally, nor is it to be presumed, that the party dealing with him in his public character, means to rely on his individual responsibility; but the contrary may be shown by proof, or circumstances which clearly establish

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an intention between the parties to the contract to create and rely upon a personal responsibility on the part of the public agent.

Copes v. *Matthews*, 398.

2. The presumption of the correctness of official action is a general one, and applies to most acts of an official or ministerial character.

Wray v. *Ho-ya-pa-nubby*, 452.

RECEIVER.

1. Whether a receiver appointed by the chancellor, in a suit pending before him, has the right in any case, unless he be specially empowered to do so by the order appointing him, to bring a suit *in his own name*, touching the subject of his receivership; — *Quære*. *Freeman* v. *Winchester*, 577.
2. If the chancellor have the power to confer such authority upon a receiver, it can only be exercised by the receiver according to the appropriate remedy; the chancellor cannot convert remedies from legal to equitable. The receiver must sue in the court having jurisdiction of the subject-matter of the suit. *Ib.*
3. The legislature, by a law passed in the year 1844, provided for placing the Mississippi Railroad Company in liquidation, for the benefit of its creditors; the state filed a bill under the act, and F. was appointed a receiver, with power to take possession of the notes and other evidences of debt, and to sue for and collect all moneys due the company. F., as receiver, filed a bill in his own name, to recover of W. the amount he had subscribed to the capital stock of the company. *Held*, on demurrer to the bill, that the liability of W. to the company, for his unpaid for stock, was purely a legal one; and, that even if F. could maintain any action therefor, in his own name, it would be an action at law, and not in equity; and, that the demurrer must be allowed. *Ib.*

RECOGNIZANCE.

The vice-chancellor, created by the act of 1842, is constituted by the act a *conservator of the peace;* as such, he has power to commit all breakers of the peace, or to bind them in recognizances to keep it, or to answer for offences committed against it. *State* v. *Wofford*, 626.

RECORD.

1. The following caption to the record of the conviction of a principal in murder, was held to be sufficient, when the record was offered in evidence, on the trial of the accessory, to wit: "Pleas and proceedings had and done before the Honorable George Coalter, judge of the third judicial district, of the

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state of Mississippi, at a circuit begun and held in and for Hinds county, at the court thereof, in the town of Raymond, on the third Monday of November, A. D., 1846, it being the sixteenth day of said month."

Keithler v. *The State*, 192.

2. The following certificate of the clerk to a record of the court in which a principal in murder was convicted, was held to be sufficient to make the record evidence on the trial of the accessory, to wit: "The state of Mississippi, Claiborne county, *ss.* I, Dan McDougall, clerk of the circuit court, in and for the county and state aforesaid, do hereby certify that the foregoing sixteen pages and this page contain a full and perfect transcript of the papers, in relation to the change of venue from Hinds county, now on file in my office, as well as of the papers now on file in my office, in relation to proceedings in this court, and also a perfect transcript of all proceedings had here in the case stated, to wit: *The State of Mississippi* v. *Jack Fountain Silas*, charged and convicted of the crime of murder, and sentenced as set forth in said transcript, as full as the same appears of record in my office." *Ib.*

3. The judgments of the courts of the United States, must be construed to be embraced in the acts of congress, as to the authentication of judgments, or they must be esteemed as foreign judgments; in either case, the judgment must be properly authenticated. *Dorsey* v. *Maury*, 298.

4. In a suit, in this state, the certificate of a discharge in bankruptcy, by the clerk of the district court of the United States for the eastern district of Louisiana, under seal of the court, is inadmissible in evidence, without the authentication of the clerk's certificate by the judge. *Ib.*

5. In case of a lost or destroyed record, parol evidence is admissible of its contents, especially where no higher evidence is shown to exist.

Eakin v. *Vance*, 549.

6. Therefore, in an action of ejectment, where the defendant relied on a purchase at administrator's sale, of the premises in controversy, it is competent for him to show by the clerk of the probate court, that citations had been regularly issued for those interested in the premises, as the statute requires, but that they had been lost or mislaid. *Ib.*

7. If, however, the record of the court be not lost, it is not competent to prove by parol that *an order of sale* was made by the court; such order, if made, should have been placed upon the record; if there, it could not be proved by parol, if not there, parol proof could not supply it. *Ib.*

8. Where, therefore, in an action of ejectment the defendant relied on a purchase at administrator's sale of the property, and offered to prove, by parol, that citations had regularly issued according to the statute, but had since been lost, and also that an order of sale of the premises had been made by the court, and the circuit court refused to permit the proof of either to be made, and the jury found for the plaintiff; *held*, that although the court below should have permitted the proof of the loss of the citations, yet as

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that proof would not have availed the defendant, without the order for the sale, which could not be established by parol, the judgment must be affirmed. *Ib.*

REDEMPTION LAW.

See *Execution.*

RES ADJUDCATA.

1. Where the high court of errors and appeals have decided a controversy between two judgment-creditors, as to their respective rights to the proceeds of sales made on their executions, and a subsequent controversy between the same parties as to their respective rights to the proceeds of other sales made under like circumstances under executions on the same judgments, arises; the former decision will be conclusive of the rights of the parties in the latter controversy. *Martin* v. *Lofland*, 317.
2. Where a decree of the probate court is rendered, confirming and allowing the final account of an executor or administrator, by which the executor is brought in debt to the estate in a specified sum, in dollars, without distinction of currency, *constitutional currency* will be thereby intended; and in an action on such executor's or administrator's bond to recover the amount so decreed, it will be incompetent for the executor or administrator to show that in good faith he collected depreciated paper of local state banks, when it was the very best he could do for the estate; and that the balance of his final account against him was for the depreciated paper; the decree of the probate court being *for so much money*, was final and conclusive between the parties until reversed, and could not thus incidentally be rendered of no value by the circuit court. *Bailey* v. *Dilworth*, 404.
3. A judgment between the same parties for the *same cause of action*, is conclusive between them; the exceptions to this rule are, where the first action was not competent, where the plaintiff has mistaken his character, or where the judgment is given for faults in the declaration and pleadings.

Agnew v. *McElroy*, 552.

4. The plaintiff who brings a second action must show beyond all controversy that the second is a different cause of action from the first in which he failed. *Ib.*
5. Nor does it make any difference that the latter suit is in a different form of action; if the *cause of action* was the same in each, the judgment in the first is conclusive; thus a judgment in trover is a bar to an action of assumpsit for the value of the same goods. *Ib.*
6. A. sued M. in assumpsit for the value of some cotton; M. plead that A. had sued him in trover for the conversion of the same goods, and in that suit it was the judgment of the court, that he take nothing and pay the costs expended; to this A. replied, that the conversion and not the title was in issue

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in the trial of the trover suit; on that trial, A.'s title was admitted; the merits of this suit were not tried and determined in that: *Held*, on demurrer to the replication, that it was not a good answer to the plea; and judgment on the demurrer was properly rendered for the defendant. *Ib.*

RIGHT OF PROPERTY.

1. The legislature in 1820 (H. & H. 591, § 13,) passed an act providing that if in detinue, on an issue containing several things in one count, no verdict be found for part of them, it should not be error, but the plaintiff should be barred of his title to the things omitted; in 1830 they passed an act (H. & H. 654, § 75,) providing that issues for the trial of the right of any property should be tried and governed by the same rules which regulate and govern the trial of issues in an action of detinue; it was *held*, that the legislature, by the use of the word "*detinue*" in the latter act, had reference to the action as modified by the former statute. *Gilliam* v. *Moore*, 130.
2. Therefore, in an issue to try the right of property in six slaves, it will not be error for the jury to find only as to four, and bring in no verdict as to the others. *Ib.*
3. It is error to dismiss a trial of the right of property levied on under execution, where the bond has been regularly given, because no affidavit by the claimant of the property of the nature of his claim appears in the case; the statute requires an affidavit to be made, and does not allow the sheriff to take a bond for the trial of the right unless such an affidavit has been made; but while the statute requires the sheriff to return the *bond* with the execution into the court, it does not require him to return the affidavit, (H. & H. 634, § 20); his omission to do so cannot prejudice the claimant.

Ellis v. *Abercrombie*, 476.

See *Execution*.

SATISFACTION.

See *Execution*; when entry of, will not be set aside.

SEAL.

Where to a writ of attachment, the magistrate had appended a scroll with the word 'seal' written in it, the writ was held to be sufficiently sealed, though nothing was said about the seal in the body of the writ.

Commercial Bank of Manchester v. *Ullman*, 411.

SHERIFF.

See *Judgment*.

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SHERIFF'S SALE.

1. The title of a purchaser at sheriff's sale cannot be affected by the return of the sheriff, made subsequent to the sheriff's deed to the purchaser.

Banks v. *Evans*, 35.

2. Irregularities of a sheriff, in giving notice of the sale of real estate by him, under execution, will not vitiate the title of a *bona fide* purchaser at such sale; nor will a total omission of the sheriff to give the notice, or his giving it in a mode entirely different from that prescribed by law, affect the title of a *bona fide* purchaser of real estate under execution, who has no knowledge of the misconduct of the sheriff. *Monet* v. *Jones*, 237.

3. A sale by a sheriff of real estate, is not the exercise of a mere naked statutory power, uncoupled with an interest, but is the exercise of a power conferred by the judgment and execution. *Ib.*

4. The statute of this state (Acts of 1841, p. 116,) requires the sheriff to advertise real estate levied on under execution, for thirty days, by posting up notices in at least five public places in the county, one of which shall be at the door of the court-house. That statute was adopted by the United States circuit court; and the marshal of the state, having levied on real estate under an execution in his hands, advertised it for thirty days in a newspaper, instead of in five public places in the county, as required by the statute. The purchaser brought an action of ejectment against the defendant in execution; and it was *held*, on proof of these facts, the judgment and execution being regular, that the purchaser had a right to recover the land, if he had no knowledge of the defective notice. *Ib.*

5. Where persons purchase real estate at sheriff's sale, they will not be heard afterwards to say that they were ignorant of conveyances made by the defendant in execution, before the date of the judgments under which they were buying, if those conveyances were on record in the proper office in the county; such record was constructive notice, and the law fixes on the purchasers a knowledge of what they were buying. *Hand* v. *Grant*, 514.

6. *Caveat emptor* is the rule in sheriff's sales; and a purchaser thereat cannot be permitted to say that he obtained less than he supposed he was buying. *Ib.*

7. Where persons are seeking to be relieved from the payment of money bid by them for property at sheriff's sale, on the ground that the defendant in the execution had no *salable* interest in the property purchased; and it appears that one of the executions bound the property sold, the purchasers, if they allege that execution was paid, must show affirmatively that it was paid before the sale. *Ib.*

See *Execution; Title.*

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STATES OF THE UNION.

1. The several states of the Union are each sovereign and independent, and their relations are those *of foreign states in close friendship*, in regard to all matters not surrendered to the general government; and but for the acts of congress, the judgments of each state would be regarded as foreign judgments in every other. *Dorsey* v. *Maury*, 298.

2. A state is entitled as a corporation to institute actions in this state. *Hines* v. *The State of North Carolina*, 529.

SUIT AT LAW.

1. In every action at law, the plaintiff must show a legal title to the instrument sued on; and if he have none, he cannot recover on the instrument, although the defendant may have promised him to pay it. *Beard* v. *Griffin*, 586.

2. B. executed his bond payable to A., who died the holder of the bond; on his death, C., who had been book-keeper of A., sold the bond without indorsement to T., to whom, while holder, B. promised, in the presence of G., to pay it; upon which, G. obtained it from T., and brought suit against B. upon it, in one count of the declaration alleging this promise by B.; the latter plead want of title in G. to the bond: *Held*, that the facts sustained the plea; the legal title was in the administrator of A., who alone could sue on the bond; the promise of B. was a waiver of defence to the bond in the hands of a legal holder; but did not dispense with proof of title in the holder. *Ib.*

See *Receiver*.

SUPERSEDEAS.

A *supersedeas* is not the proper remedy for the violation, by a plaintiff in execution, of an injunction against the issuance of the execution; an attachment for contempt of the injunction is the remedy. *Commercial Bank of Manchester* v. *Waters*, 559.

SURETIES.

1. P. and B. and G. being sued as sureties on a bond executed by R. S. G. as principal, and them and M. and H. as sureties, payable to the state, conditioned for the faithful discharge by R. S. G. of his duties as state treasurer, plead that M. and H. had signed and sealed the bond as sureties, when it was presented to them; and they signed and sealed it likewise, as sureties, in the belief that the bond was the valid act of M. and H.; but that M. and H. had delivered the bond to R. S. G., the principal, to be binding on M. and H., on condition that W. H. and S. P. would also exe-

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cute the same, and that W. H. and S. P. had not executed it, by which means M. and H. were not liable on the bond, wherefore P. and B. and G. were not liable, wherefore, &c.; *held*, that the plea did not aver any such fraud in the obtaining the instrument, as to render it void as to the defendants pleading it; the fraud was committed on the sureties by the principal, and not by the state; and as the sureties trusted the principal, they must suffer the consequences. *Graves* v. *Tucker*, 9.

2. If a principal, in procuring one to become his surety, commit a fraud upon the surety, either in suppressing or misstating facts, and the creditor has no knowledge of and gives no assent to the fraud, the surety will be liable to the creditor. *Ib.*

3. An engagement, as surety for a particular person, relates exclusively to the acts of that person, and will not extend to another; and the terms of a guaranty must be strictly followed. *Dick* v. *Crowder*, 71.

4. A plea to an action on a note, made by several, that two of the defendants were sureties of the principal debtor, and that for a valuable consideration paid to the plaintiff, he gave indulgence to their principal for twelve months, without their consent or agreement, is a good plea in bar of the action.
Deut v. *Coleman*, 83.

5. A surety has a right, under the statutes of this State, to require the plaintiff in execution to make the money out of the principal.
Baine v. *Williams*, 113.

6. Where, immediately after the entry of the rendition of a judgment, the record recited, "And *the defendant* agrees to stay execution until the first of May, 1840," it was *held*, that even if by *defendant* was meant *plaintiff*, it did not appear that the stay was made upon *consideration*, or to be binding on any party, and if a mere voluntary offer, it did not discharge a surety to the note on which the judgment was rendered.
Union Bank of Tennessee v. *Govan*, 333.

7. An agreement to give the principal time, which will discharge a surety, must be positive and binding, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence was given; therefore, where the plaintiff in a judgment directed the sheriff to hold up an execution against the defendant, until he should hear from him again, it was *held* not to be such a stay of the execution as would discharge a surety to the note on which the judgment was rendered. *Ib.*

See *Escrow; Forthcoming Bond;* and *Bill of Exchange and Promissory Note.*

TAX COLLECTOR'S SALE.

1. The rule in relation to tax collectors' sales, is different from that in relation to sales by sheriffs. If the notice be irregular, the purchaser cannot recover; he must prove that the statute has been strictly complied with.

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The tax collector derives his whole power from the statute; and his authority must depend upon a strict compliance therewith.

President and Selectmen of Natchez v. *Minor*, 246.

2. It has never been decided in this state, that an administrator's vendee would be affected by any mere irregularity, on the part of the administrator, in making the sale, after a valid order and judgment condemning the land to be sold. Whether a failure by an administrator, after such order to give the notice of the sale, as required by the statute, would vitiate the sale, — *Quære. Ib.*

TITLE.

1. In February, 1839, T. executed a deed of trust to W. as trustee, to secure the payment of a sum of money to B. In April, 1839, a judgment was obtained against T., and, under execution on this judgment, R., in 1842, bought the property conveyed by the deed of trust. In May, 1839, T. executed a deed in fee simple to B. of the same property. In 1842 W., the trustee, sold the property under the deed of trust, and it was bought by B., who sued R. in ejectment for the property; *held*, that the absolute conveyance by T. to B., in May, 1839, did not vest in B. the legal title, and thus merge the deed of trust; that T. had but an equity to convey to B., and by his deed he only conveyed that equity. The perfect, legal title was in W., the trustee, and never passed out of him until the sale under the deed of trust, by which B., having before the perfect equitable, became also the owner of the perfect legal title; and therefore no title passed to R. by the sheriff's deed. *Brown* v. *Bartee*, 268.

2. Where the grantor, in a deed of trust, subsequently conveys the property granted, to the *cestui que trust*, the deed of trust is not thereby extinguished, merged or rescinded; parties holding mere equities can only dispose of equities, they cannot affect the legal title. *Ib.*

3. The execution, by the grantor in a deed of trust, of an absolute deed, by which he conveys the property formerly conveyed in trust, absolutely to the *cestui que trust* is not a *payment of the deed of trust;* the absolute deed only operated to extinguish the grantor's interest; the legal title still remained in the trustee. *Ib.*

4. In every action at law, the plaintiff must show a legal title to the instrument sued on; and if he have none, he cannot recover on the instrument, although the defendant may have promised him to pay it.

Beard v. *Griffin*, 586.

5. B. executed his bond payable to A., who died the holder of the bond; on his death, C., who had been book-keeper of A., sold the bond without indorsement to T., to whom, while holder, B. promised, in the presence of G., to pay it; upon which, G. obtained it from T., and brought suit against B. upon it, in one count of the declaration alleging this promise by B.; the

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latter plead want of title in G. to the bond: *Held*, that the facts sustained the plea; the legal title was in the administrator of A., who alone could sue on the bond; the promise of B. was a waiver of defence to the bond in the hands of a legal holder; but did not dispense with proof of title in the holder. *Ib.*

See *Execution*.

TITLE DEEDS.

See *Executor and Administrator;* when deposit of title deeds amount to equitable mortgage.

TRESPASS.

1. In an action of trespass, the defendant asked the court to instruct the jury, that if they believed that the defendants acted by summons of an officer to assist him in executing legal process, and did not exceed their authority in their acts, they should find for the defendants; *held*, that the instruction was legal and proper and ought to have been given; legal process is as much a justification to those summoned to aid an officer in executing it, if they do not commit excesses, as to the officer. *Payne* v. *Green*, 507.

2. P. and others were sued in trespass, in five counts, for five different trespasses; the declaration charging the trespasses to have been committed *on a certain day, and on divers other days, between that and another day;* the defendants plead *not guilty*, generally, and the parties agreed that any special matter might be given in evidence which might have been pleaded; the plaintiff proved several trespasses by the defendants, all committed within the time laid, some committed while an officer was present with a search-warrant, and they were by his summons aiding him in the search, and others, before the officer was present; the defendant on the trial asked the court to instruct the jury that if they believed the defendants acted by summons of the officer to aid him in executing his warrant, and they did not exceed their authority, they must find for the defendants: *Held*, that under the pleadings and proof the instruction was applicable and ought to have been given. *Ib.*

3. The plaintiff in trespass by alleging trespasses to have been committed on a certain day, and on divers other days between that and another day, makes the *time* a descriptive part of the trespass, opens the door for proof as to any trespass committed within that time, but excludes all others. *Ib.*

4. Where there are several counts in a declaration in trespass, and a general plea of *not guilty*, with leave given to give any special matter in evidence that might be pleaded, the plea will be as broad as the declaration, and will be considered as justifying to the counts collectively and separately and to each trespass, where the counts are so framed as to include more than one trespass. *Ib.*

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TRUST.

See *Chancery*, *Deed of Trust*, and *Will*.

USURY.

1. Under the statute of this state which prohibits the taking, directly or indirectly, for any contract, bond or note for the payment of money, founded on any bargain, sale, or loan of wares and merchandise, goods and chattels, lands and tenements, or any use or occupation thereof, more than *eight* per cent. interest, a sale of a tract of land and negroes, estimated at a *cash price* of fifty-three thousand dollars, on a credit of six years, the different instalments bearing *ten* per cent. interest *per annum*, is usurious; although the statute authorizes the taking of ten per cent. on a *bona fide* loan of money.
Torrey v. *Grant*, 89.

2. If a note be affected with usury in its origin, every renewal or change of the security is equally affected; nor will the usury be cured when a greater sum than the usurious interest is paid on the debt. *Ib.*

3. The indorsee of an usurious note, who at the time he obtained the note had knowledge of the usury, cannot recover thereon beyond the principal sum, even though he took the note upon the assurance of the maker that he would make no defence to it; the consideration being an illegal one, the waiver of the defence was not binding on the maker as to a party having notice; it would be otherwise with a mere failure of consideration. *Ib.*

4. Where a judgment was rendered against A. & M., upon which execution issued and was levied on personal property; and B. joined with them as their surety in a forthcoming bond, which was forfeited; it was held, that B. could not seek relief in equity, in his own name, on the ground that the original judgment was founded on an usurious consideration.
Baine v. *Williams*, 113.

VARIANCE.

1. In appeals from justices, the circuit court acts as an appellate court; it has only such jurisdiction as the justice had, and the case must be tried *de novo* on its merits. Therefore, where, on an appeal from a justice's court, in a suit upon an express agreement to pay rent, the declaration alleged occupation by the request of the defendant, and by the permission of the plaintiff; and the proof was, that the defendant agreed to pay the plaintiff ten dollars per month for the rent of the premises; it was *held*, that there was no such variance as would affect the merits. *Stier* v. *Surget*, 154.

2. Where there is a variance, the proper course is to exclude the proof; if it is admitted, advantage of the variance cannot be taken in the high court of errors and appeals. *Ib.*

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3. The affidavit in an attachment, stated that Ullman and Hausman were indebted, &c.; the bond recited that Ullman and H. Hausman were indebted, &c., and the declaration declared against Henry Ullman and William H. Hausman; it was *held*, that the variation was immaterial.

Commercial Bank of Manchester v. *Ullman*, 411.

VENDOR AND VENDEE.

1. How far the vendor's equitable lien will prevail against a judgment creditor of the vendee, whose judgment was older than the sale from the vendor to the vendee, — *Quære.* *Taylor* v. *Strong*, 63.

2. It seems, where there is a judgment against a party, and he purchases real estate on a credit, and subsequently gives a deed of trust thereon, to secure the payment of the purchase-money, that the lien of the judgment will be paramount to the vendor's lien or that of the deed of trust; and the real estate thus purchased, will be liable to sale under the judgment.

Baine v. *Williams*, 113.

3. W. and B. filed their bill against J., alleging that A. and O. sold them a tract of land for $4,160, of which $1,200 was paid in cash, and the rest to be paid in twelve, twenty-four, and thirty-six months; the vendors gave a bond to make title when the money was paid; W. assigned his interest in the land to N. G. W. and indorsed on the title bond a direction to A. and O. to convey to N. G. W. his interest, when N. G. W. had paid the portion of the purchase-money due by W. Afterwards N. G. W. sold by parol to J., who prevailed on B., his co-tenant in common, to induce A. and O. to convey to J. that portion of the land bought by W. The bill alleges further, that $1,000 of the original purchase-money were still due to A. and O. by W., and prays that the land may be subjected to the payment of it; A. and O. were not made parties to the bill. *Held*, that W. not having paid the purchase-money to A. and O., had no vendor's lien on the land; and that, although he was probably released from his indebtedness to A. and O., by their execution of the deed to J., yet as they were not parties to his bill, he could have no relief against them, and his bill must be dismissed.

Thompson v. *Williams*, 173.

4. The vendor of land has a lien for the purchase-money, whether he makes a deed or gives bond for title; in the latter case the retention of title by the vendor is, in effect, the same thing with conveying the title and taking a security for the purchase-money by mortgage; and any assignment by the vendor, who has merely given bond for title on payment of the purchase-money, of the notes given by the vendee, will pass to the assignee all the rights of the vendor. *Parker* v. *Kelley*, 184.

5. And when the vendor, who has given a bond to make title on payment of the purchase-money, and has received notes from his vendee for that purchase-

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money, payable at stipulated periods, assigns one of those notes, and subsequent to such assignment, makes an absolute deed to his vendee of the land, the lien of the assignee on the land, for the satisfaction of the note he holds, will not be thereby lost; he may still, in equity, subject the land to the payment of the note. *Ib.*

6. And where, after a vendor who has given a bond for title, and assigned one of the notes for the purchase-money, has also subsequently given his vendee a deed for the land, a judgment-creditor of the vendee, who has recovered his judgment since the deed was made to the vendee, will be postponed in his right to satisfaction of his judgment out of the land, to the equitable right of the assignee of the note for the purchase-money; the judgment will be a lien on the *legal title* of the vendee, subject to the equitable lien of the assignee, and when the latter is satisfied, the judgment will hold. *Ib.*

7. It is a well established general rule, that where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor; if he extinguish an incumbrance, or buy in an outstanding title, all he can ask or require is, the repayment of the money he has so laid out. *Hardeman* v. *Cowan*, 486.

8. And this rule applies, whether the purchaser of the incumbrance be by the vendee or his wife; there is such an identity between them, that what under such circumstances cannot be done by the husband, cannot be done by the wife; to permit the wife to purchase when the husband is forbidden, would be a mere evasion of the rule. *Ib.*

9. H. bought of C. a tract of land in this state for $3,600, in November, 1841; there were then judgments against C. for about $1,000; it was part of the contract of sale that H. should pay by the first of January, 1842, $600 towards these judgments, and the remainder of the purchase-money in three equal annual instalments, from March 1, 1842, when C. was to make H. a deed; H. was put, at the time of sale, in possession of the land; and C. left this state for Tennessee, where he lived; early in December, 1841, the land was sold under two of the judgments against C. at different times, and bought by L. H. for $375; L. H. was the brother of H.'s wife, and bought for her benefit and for her, advancing his own money for the purchase, but buying exclusively for his sister; H. paid the $600 at the stipulated time, and C. made him a deed which H. refused to receive on the ground that C. could not make him a title, by reason of the previous sale to L. H. *Held*, that the purchase by L. H. was in reality a purchase by the wife of H.; that H.'s wife could not set up her title thus acquired against the vendor of her husband; and that the land was subject to the payment of the residue of the purchase-money due C. after the repayment of the money to L. H. advanced by him. *Ib.*

10. H. bought a tract of land of W. for $10,500; paid five thousand dollars in cash, and entered into a covenant with W. to pay five thousand more in ten days, and five hundred on the first of January, thereafter, and W. covenanted

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"on the payment of the five thousand dollars last named" to execute good and sufficient titles for the land to H.; the latter being sued on the covenant for the $5,500 plead that W. had failed to have made to him a tender of a deed of conveyance of the land: *Held*, on demurrer, that the plea was a good bar to the action. *Wadlington* v. *Hill*, 560.

11. A vendor of land, who stipulated by his title bond to make the vendee "*a good and perfect deed*" to the land sold, does not discharge his covenant by the execution of a deed good in point of form; but fully to comply with his covenant, he is bound to make a good and perfect title to the land, and to remove any existing incumbrance, or protect the vendee against it. *Greenwood* v. *Ligon*, 615.

12. And it seems that the failure of the vendor to procure his wife's relinquishment of dower, would be a breach of the covenant to make "*a good and perfect deed.*" *Ib.*

VICE CHANCELLOR.

The vice chancellor, created by the act of 1842, is constituted by the act a *conservator of the peace;* as such, he has power to commit all breakers of the peace, or to bind them in recognizances to keep it, or to answer for offences committed against it. *Wofford* v. *The State*, 626.

WARRANTY.

1. No particular form of words is necessary to the creation of a warranty; any affirmation or representation in relation to the article sold is sufficient, if it be intended to have that effect. *Otts* v. *Alderson*, 476.

2. The law implies a warranty, 1. That the seller has title; 2. That the articles are merchantable where, from their nature or situation at the time of the sale, an examination is impracticable. 3. Upon an executory contract to manufacture an article or to furnish it for a particular use or purpose, that it is reasonably fit and proper for such use and purpose as far as an article of such kind can be; 4. Against all latent defects, 1st, when the seller knew the buyer relied on the judgment of the seller who knew or might have known the existence of the defects; 2, where a manufacturer or producer undertakes to furnish his articles in answer to an order; 5. That goods sold by sample correspond with the sample in quality. *Ib.*

WILL.

1. Where, in an action of detinue for the recovery of certain slaves, upon the trial in the circuit court, the plaintiffs offered in evidence a copy of a will, duly attested under the act of congress on the authentication of records, which will purported to have been duly probated in the state of Virginia, and under which will the plaintiffs claimed title, as devisees and the heirs of

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devisees, the refusal of the circuit court to admit the copy in evidence, because there was no proof that the will had been proved and admitted to record in any probate court in this state, was held to be error.

Melvin v. *Lyons*, 78.

2. It is a general rule, that before any testamentary paper can be admitted in evidence, it must receive probate of the proper court. *Ib.*

3. The copy of a will, which has been duly probated in any state in the union, is admissible in evidence in this state, when certified according to the act of congress of May 26, 1790, prescribing the mode in which the public acts records and judicial proceedings in each state shall be authenticated, so as to take effect in every other state. *Ib.*

4. It seems, that the statute of this state, (H. & H. 388, § 13,) which provides, that authenticated copies of wills, proved according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, may be offered for and admitted to probate in the probate courts of this state, but subject to be contested and controverted in the same manner that the original might be, was not designed to establish a rule for the admissibility of a copy of such will, in evidence on a trial in the circuit courts, at the suit of persons claiming under such will, in the face of the act of congress of May 26, 1790; no such rule, even if designed, would be valid. *Ib.*

5. The great rule of interpretation of wills is, that the intention of the testator must be ascertained from the language employed, and must be carried into effect if not inconsistent with the rules of law. In seeking for the intention, words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another, can be collected.

Vannerson v. *Culbertson*, 150.

6. Where a clause of a will was in the following words, viz. "I give, devise and bequeath to my beloved wife, Mary Purnell, for her life to her exclusive use, during the term of her natural life, in lieu of her dower and distributive share, in and to my real and personal estate in the state of Mississippi, the mansion-house occupied by us as our residence, and the tract of land on which said house stands, and all the outbuildings, improvements and appurtenances thereunto belonging; together with all the furniture, plate, carriages, horses, mules, stock, garden and farming utensils, servants, slaves and chattels, now used or engaged in and about said dwelling-house and premises, or either of them, and constituting any part of our said dwelling establishment on said premises, or the cultivation of the same; and that upon my said wife's death, said land and mansion-house shall go to my said son Thomas and his heirs;" and there was no other portion of the will affecting the sense of these words; it was *held*, that the wife did not have an absolute interest in the slaves therein bequeathed to her, but took only a life estate in them. *Ib.*

7. Under the statute of this state (How. & Hutch. 385,) which provides that

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there shall be three or more witnesses to a will when real estate is devised, and two when personal, (unless the will be wholly in the handwriting of the testator, when no witness is required,) a will cannot be admitted to probate, unless all the subscribing witnesses, alive and within the control of the process of the court, are produced to testify. *Evans* v. *Evans*, 402.

8. Although the language of a will may make an absolute gift, yet if other appropriate expressions be used which show with sufficient certainty, that but a qualified gift was intended, a court of equity will look to the clear intention of the testator, and raise a constructive trust where none has been declared. *Lucas* v. *Lockhart*, 466.

9. But the words of recommendation or of hope used by the testator, must be certain, 1. as regards the objects to whom such terms are applied; 2. the subjects of property given must also be certain; the words are then imperative and create a trust. *Ib.*

10. L., by the first clause of his will, devised his whole estate, real and personal, to his wife during her widowhood; by the fourth clause, he declared that "during my wife's widowhood, she is to have the entire use, profits and control of my estate, and to her discretion do I intrust the education and maintenance of my children during that time;" and this clause further proceeded to provide for the maintenance and education of the children "out of the profits" of his estate, in case of the death or marriage of his widow: *Held*, that the language of the will imperatively commanded that the children should be educated and supported, and set apart a specific fund for that purpose; the widow, therefore, took the estate coupled with this trust, and, in consequence, it was not liable while the children lived, to be sold to satisfy judgments against the widow. *Ib.*

11. In such case, if the widow will not protect the property of the estate when levied on under execution against her for her own debts, it is the duty of the administrator with the will annexed, to do so; the property being still the estate of the testator, subject to a charge in favor of his heirs, the administrator being the representative of the estate, is a joint trustee with the widow, and may interpose his claim by trial of the right of property to prevent the trust from being defeated. *Ib.*

12. It is competent for a volunteer in the army of the United States, in Mexico, who is a citizen of this state, to make his last will and testament while abroad in Mexico. *Anderson* v. *Pryor*, 620.

13. And a letter, written by such volunteer, from Mexico, throughout in his own handwriting, in which he expresses his desire and intention, in case of his death, that his property should go to his niece, will be properly admitted to probate on his death, as his last will. *Ib.*

14. While a letter from the same person, in which he expresses his willingness to aid his brother, who was in difficulties, with all his property, was not testamentary, and therefore not entitled to probate. *Ib.*

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